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ONTARIO LABOUR RELATIONS BOARD REPORTS



April 1986



Ontario

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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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2864-85-M International Union of Operating Engineers Local 793, Applicant, v. Arlington Crane Service Limited, Respondent

Construction Industry Grievance - Practice and Procedure - Whether applicant required to prove delivery of grievance to respondent before referral to Board - Whether failure to deliver mere technical defect - Whether applicant required to go through grievance procedure in collective agreement before referral under s. 124 - Whether delay in making referral reason to refuse entertaining grievance

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *F. W. Murray* and *D. A. Patterson*.

APPEARANCES: *Bernard Fishbein* and *E. A. Ford* for the applicant; *Morris Manning* for the respondent.

DECISION OF THE BOARD; April 25, 1986

1. This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*.
2. The hearing in this matter convened on April 21, 1986.
3. During the course of the hearing the Board delivered the following oral ruling:

This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*. Counsel for the respondent made, by way of preliminary motions, objections to the Board's hearing the grievance on its merits.

Both counsel agreed with the Board's suggestion, after hearing Mr. Manning's opening argument, that as the first preliminary objection raised by the respondent might well require the resolution of a factual dispute, the Board would proceed with evidence and argument on that first issue.

Counsel for the respondent submitted that the applicant was required to prove that it had delivered the grievance that is the subject matter of this referral to the respondent prior to referring the matter to arbitration before the Board under section 124 of the Act.

The applicant called three witnesses to establish that the grievance had been delivered to the respondent well before February 21, 1986, the date the grievance was referred to arbitration by the Board.

William Pedder, a business agent of the applicant, testified that he instructed his secretary to type up the grievance form that is dated October 31, 1985 and the letter dated November 1, 1985, those two documents being exhibit #1 in this matter. He instructed her to mail those

documents to the respondent by certified mail. Mr. Pedder recalled seeing a proof of delivery card attached to the grievance dated October 31, 1985. (Those two documents are exhibit #2 in this matter). The proof of delivery card makes reference to a grievance dated November 1, 1985.

Glenn McLeod, the area supervisor of the applicant, testified about the office procedure and identified the proof of delivery card as having been received by the applicant.

Mr. McLeod and Ernest Ford, the Labour Relations Manager of the respondent, both testified that they were familiar with the signature of Dolly Foran, a principal of the respondent and thought that Mrs. Foran's signature was on the card indicating that documents had been received by the respondent. We note that Mr. Ford had not seen Mrs. Foran actually sign any documents.

Counsel for the applicant submitted that the grievance was, in fact, delivered, as evidenced by exhibit #2, and also relies on section 113(1) of the Act. He also submitted that, in any event, even if the grievance had not been delivered prior to the referral being made to the Board, such failure was a mere technical irregularity. He argued that the respondent was not prejudiced and the Board could relieve against the failure to comply with the technical requirements of section 124(2) by exercising its jurisdiction under section 114 of the Act.

The Board did not ask counsel for the respondent to reply to the second, alternative argument made by counsel for the applicant.

Section 124(2) of the Act states:

"A referral under subsection (1) may be made in writing in the prescribed form by a party *at any time after delivery of the written grievance to the other party*, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing."

In our view, it is not too onerous to require a party to a collective agreement to deliver a grievance to another party to that agreement before referring the grievance to arbitration before the Board. The failure to deliver the grievance before referring the grievance to the Board under section 124 of the Act is not a mere technicality, but rather prevents the Board from dealing with the merits of the matter. See *Arthur G. McKee of Canada Ltd.*, [1978] OLRB Rep. April 351 at 353 paragraphs 6 and 7.

Therefore, the issue before the Board is whether delivery of the grievance was effected on the respondent before the matter was referred to the Board under section 124 of the Act. Counsel for the respondent argued that the applicant did not establish in evidence that the grievance had been mailed to the respondent. He submitted that no one

testified that it had been mailed. The only evidence was that Mr. Pedder instructed his secretary to mail it. Furthermore, counsel submitted that exhibit #2 refers to a grievance dated November 1, 1985 whereas the grievance that is the subject matter of this referral was actually dated October 31, 1985. He also referred to the omission in paragraph 6 of Form 104 as further evidence that the grievance had not been delivered to the respondent.

Mr. Pedder's evidence satisfies us that he instructed his secretary to mail the original of exhibit #1 to the respondent shortly after he signed both documents. The proof of delivery card, although referring to a grievance dated November 1, 1985, was returned by the post office and is evidence that something was mailed. The card was attached to the grievance form. We heard evidence that those cards are ordinarily attached to the documents to which they relate for filing when they are returned by the post office to the applicant.

We can therefore draw the inference that the original of exhibit #1 was mailed to the respondent on or before November 4, 1985, the post mark that is on the proof of delivery card.

Section 113(1) of the Act provides:

“For the purposes of this Act and of any proceedings taken under it, any notice or communication sent through Her Majesty's mails shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail”.

Therefore, since we are satisfied that the original of exhibit #1 was mailed to the respondent, we presume and therefore find that it was delivered in the ordinary course of mail, which, in our view, was well before February 21, 1986.

We rely on section 113(1) of the Act since the respondent has not proved to the contrary. Indeed, we note that the respondent called no evidence on this issue.

Therefore, the respondent's first preliminary objection is dismissed.

4. After the Board delivered the above oral ruling, the Board heard further submissions with respect to a second preliminary objection to this matter made by counsel for the respondent. After hearing those submissions, the Board delivered the following oral ruling:

Counsel for the respondent submits that the Board ought to exercise a discretion to refuse to decide the merits of the grievance in this matter because the applicant has not gone through the grievance procedure in the collective agreement that the applicant alleges the respondent has violated. Counsel submits that the Board ought not to permit the respondent to be deprived of its right under section 44 of the

Act and the collective agreement to have a say in the creation and composition of an arbitration board.

Counsel also submits that the delay in the referral to the Board after delivering the grievance to the respondent requires the applicant to explain the delay, and in the absence of an explanation, the Board should dismiss the grievance.

We do not agree. The Act is quite clear in permitting a party to refer a grievance to arbitration under section 124 of the Act after the grievance has been delivered, notwithstanding the grievance and arbitration procedures under the collective agreement. Even assuming the Board has the discretion that counsel for the respondent suggests that we have, it seems to us that section 124 of the Act creates a distinct process to resolve grievances in the construction industry.

We adopt the Board's approach set out in *Lummus*, [1976] OLRB Rep. Jan. 980, that was approved by the Divisional Court in *Ontario Erectors Association v. International Union of Operating Engineers, Local 793*, unreported, February 19, 1980, per Osler J., where Mr. Justice Osler stated for the court:

"A preliminary point was raised before the Board as to whether it had to consider the stage to which the grievance procedure had reached, and the fact that the procedure within the agreement itself had not been concluded. The Board dealt with this point in paragraph 4 of its reasons in the following succinct paragraph:

'In the *Lummus* case the Board held that the effect of section 112a [now 124] of the Act is to establish a dispute settling mechanism separate and apart from any grievance and arbitration procedure set out in a collective agreement. In reaching this decision the Board stated that it was compelled to the result by the 'clear and simple wording of the legislation.' The Board also noted that its decision reflected the underlying objective of the legislation of providing for a speedy process by which to resolve disputes arising out of the interpretation of the collective agreements negotiated in the construction industry. With respect to the instant case, we similarly find that even if the applicant did fail to follow the grievance procedure set out in the collective agreement, that fact itself would not be fatal to this referral. Before leaving this point, it should be noted that the representative of the applicant at the hearing disputed the contention that the grievance procedure set forth in the collective agreement had not been adhered to.'

The reference to the *Lummus* case is a reference to an earlier decision of the Board, cited as (1976) O.L.R.B. Reports, January, 1980. We find nothing that can be objected to in that paragraph. It was a decision the Board was authorized to make. It reflects a common sense interpretation of the words of section 112a and if it were for us to decide we would agree with that interpretation. It was, however, one for the Board and one with which we cannot interfere."

As for the argument about delay, we find that it is not incumbent upon the applicant in this case, as a preliminary matter, to explain or justify the amount of time that elapsed between delivering the grievance to the respondent and referring it to arbitration before this Board. In our opinion, that argument may be raised by the respondent

should the Board ultimately be required to determine what remedy is appropriate if a violation is made out.

For these reasons, the respondent's second preliminary objection is hereby dismissed.

5. Following the Boards oral ruling, the Board began receiving submissions from counsel for the respondent with respect to the ability of any panel of the Ontario Labour Relations Board, including this panel, to deal with the matter before it on the grounds that the process violates both the common law and the Canadian Charter of Rights and Freedoms. That argument was not completed. During the course of argument, the parties and the Board agreed that counsel for the respondent could renew the argument from the beginning with respect to the challenge to the Board's ability to hear the matter at the next day of hearing.

6. The Board then entertained submissions from counsel for the respondent with respect to the scope of the grievance filed in this matter. While counsel for the respondent finished his argument in chief, the argument made by counsel for the applicant was not concluded by the end of the day. However, during the course of the argument, counsel for the applicant agreed to provide to counsel for the respondent further particulars with respect to alleged continuing violations of the agreement by the respondent by April 25, 1986. Counsel for the respondent undertook to advise counsel for the applicant and the Registrar of the Board not later than May the 9th, 1986 whether the respondent would agree to the additional particulars filed by the applicant to form part of this proceeding.

7. The Board hereby directs the Registrar to fix four more days of hearing before this panel of the Board in consultation with counsel for the parties.

2829-85-U The Canadian Red Cross Society Blood Transfusion Service, Complainant, v. The Canadian Red Cross Blood Transfusion Service Employees Association, Respondent

Evidence - Practice and Procedure - Witness - Company witness alleging in cross-examination that union negotiator made strike threat at bargaining table - Union seeking production of notes made by witness at bargaining table to test credibility of testimony - Whether all notes or only that relating to issue subject to production

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *R. J. Gallivan* and *L. C. Collins*.

APPEARANCES: *John W. Woon*, *Hector B. Martinez* and *Peter Friesz* for the complainant; *B. P. Bellmore*, *Mary Jean O'Connor* and *Ann Noble* for the respondent.

DECISION OF THE BOARD; April 30, 1986

1. The Canadian Red Cross Society Blood Transfusion Service (the "Service") alleges that The Canadian Red Cross Blood Transfusion Service Employees Association (the "Association"), the bargaining agent for the Service's employees, has contravened section 15 of the *Labour Relations Act*. The Service argues that the Association has bargained to impasse on the issue of a single collective agreement for both full-time and part-time employees and that it is unlawful to bargain to impasse on that issue. The full-time employees have been certified for several years. The part-time employees were certified December 18, 1985 in a separate bargaining unit.

2. The hearing into this complaint began on April 15, 1986. During the hearing, the Board was required to make several procedural rulings. This decision deals with the entitlement of the Association to notes prepared by the Society's first witness, Mr. Peter Friesz, Senior Labour Relations Officer for the Society, during negotiations on the renewal of the collective agreement for the full-time employees. During cross-examination of Mr. Friesz by counsel for the Association, Mr. Friesz acknowledged that he had taken notes during the negotiating meetings held between the Society and the Association on November 20, 1985 and on January 16, 17 and 21, 1986.

3. Mr. Friesz had testified in chief that during these meetings, the chief spokesperson for the Association, Mr. Brian Bellmore, had threatened strike action or other unspecified consequences, if the Service refused to bargain one agreement for both the full-time and part-time workers. In addition to his role as the Association's chief negotiator, Mr. Bellmore also appeared as counsel for the Association at the hearing. During cross-examination, Mr. Friesz admitted that he would probably have made a record of Mr. Bellmore's comments at the meetings because they were "unusual" (with specific reference to the November 20th meeting) and agreed that he would note comments he perceived to be a threat (with reference to the January meetings). Mr. Friesz further testified that he had used his November notes to refresh his memory before testifying, but that he had not looked at his January notes before attending the hearing.

4. Thereupon counsel for the Association sought production of all the notes made at

the November and January meetings. He submitted that the witness, as an experienced negotiator, would make a note of a strike threat by a party at the bargaining table and that therefore the absence of such notation would cast doubt on the witness's credibility.

5. Because the Association's requests for the notes were based on different reasons for the meeting of November 20, 1985 and for the three January 1986 meetings, our rulings are set out separately.

6. Since Mr. Friesz admitted that he had referred to his November 20, 1985 notes prior to giving his testimony in order to refresh his memory, we ordered that those notes be produced to counsel for the Association. The Service produced the November 20th notes in compliance with the order. The November 20th notes raise no further issue.

7. The question of production of the January notes was not as easily resolved. Mr. Friesz testified that he had not looked at them before coming to the hearing to give his testimony. Counsel for the Association thus sought production of the three sets of January notes on the basis that they had been prepared by Mr. Friesz in the ordinary course of business. We ruled that the Association was entitled to production of all relevant notes dealing with Mr. Bellmore's comments, as negotiator, relating to a strike threat made during negotiations. We accordingly ordered the Service to produce the January 16th, 17th and 21st notes. Counsel for the Service was given an opportunity to examine all the notes to determine which of them were relevant to the issue of Mr. Bellmore's comments.

8. After examining the notes, counsel for the Service agreed to produce notes relating to Articles 1 and 2 of the Proposals for a Collective Agreement which had been entered as Exhibit 4 by the Service; these Articles were entitled "Interpretation" and "Recognition", respectively, and referred to part-time employees. He also stated that there was one other line in notes on wage levels which he could produce without revealing the other material on the same page. However, he further stated that the other notes were all concerned either with bargaining issues other than a single collective agreement and so were not relevant, or dealt with the Society's bargaining strategy and so should not be revealed. Counsel for the Association demanded production of all the notes on the basis that he was entitled to view them to determine whether there were other notations made which had not been revealed by counsel for the Service. He submitted in addition that the detail in which Mr. Friesz kept notes might be relevant, since if his notes were detailed, a failure to refer to any particular event would be especially significant with respect to Mr. Friesz's credibility. Obviously, sketchy notes would be less significant. The extent of the detail could be determined only by assessing all the notes in that light.

9. We explained that in this situation we had a responsibility to balance two important interests: the right of the Association to make a full defence to the allegations made against it by the Service and the right of the Service to maintain the secrecy of its negotiating strategy. More broadly, we desired to maintain both the integrity of the hearing process in a particular case before us and the integrity of the collective bargaining process underlying labour relations in Ontario. In an attempt to reach agreement between counsel, we suggested that counsel for the Association could obtain evidence about what Mr. Bellmore had said at the meetings through other witnesses. The evidence had indicated that several representatives of the Service and the Association, other than Mr. Friesz and Mr. Bellmore, had been present at the meetings. If their testimony contradicted that of Mr. Friesz, it would be available to the

Association to impugn Mr. Friesz's credibility. Counsel for the Association rejected other testimony as a substitute for Mr. Friesz's notes. We then proposed that we examine the notes to determine whether there were other references to statements made by Mr. Bellmore. Counsel for the Service agreed to that proposal. Counsel for the Association rejected the proposal, arguing that the Board might see material not relevant to the issue, but nevertheless capable of influencing the Board. He would have accepted an "independent adjudicator", but not the panel sitting on the case. We then retired to consider whether our ruling required production of the January notes other than those which counsel for the Service had already indicated he would produce.

10. In reaching our decision, we were influenced by our reluctance to permit the Board's own procedures to be used, even potentially, to benefit one party to negotiations when the material which would be revealed was not the subject of the complaint. In this case, the matters which the Service objected to revealing to the Association concerned bargaining issues which were not part of the complaint. Upon resuming the hearing, we confirmed that the Service was prepared to produce the notes relating to Articles 1 and 2 of the Association's proposals, which dealt with matters directly in issue in the complaint, as well as the one line elsewhere in the witness's notebook. We further confirmed through the representation of the Service's counsel that the remainder of the notes dealt with matters not directly at issue in the complaint, but at issue at the bargaining table. We then issued the following oral decision:

In considering this matter, the Board has attempted to balance the right of the Association to present its case and the right of the Service to keep its negotiating strategy secret. The Board therefore determines that the notes agreed to be produced by the Service, that is the notes of January 16, 17 and 21 relating to Articles 1 and 2 of the Proposals and the single line referred to by counsel for the Service, satisfy the Board's order to produce the January 16, 17 and 21 notes. The other notes are not relevant to the issues in this case. They do, however, contain references to the Society's bargaining strategy. Therefore, even where there might be some relevancy, to require their production simply to permit Mr. Bellmore to determine that there was nothing in them relevant to the issue of Mr. Friesz's credibility would be unreasonable in light of the prejudice to the employer's bargaining position involved in such production. The Board rules that its order to produce the January 16, 17 and 21 notes will be satisfied by production of the notes relating to Articles 1 and 2 and the additional single line. The other notes are outside the scope of the Board's order.

11. Our order in this matter must be understood in the context of factors specific to the case at hand. First, the notes were sought in order to impugn credibility; they were not sought because the union was bringing the entire bargaining process or strategy of the employer into issue. Counsel for the Association had not otherwise impugned Mr. Friesz's credibility; he wished the notes to determine whether he could use them for that purpose. Second, the Board accepted that the notes which were not produced were related to bargaining matters which were not directly at issue in the complaint; that is, they were not related to the question of a single agreement for both full-time and part-time employees. The employer agreed to produce the notes which related to the issue of a single agreement. Third, there were other ways to obtain the evidence necessary to challenge the credibility of the Service's witness and

the truth or otherwise of his allegations that Mr. Bellmore, in his role as the union's chief negotiator, had made certain comments during negotiations. In particular, the Association could call other witnesses who were, the evidence already showed, present at the relevant meetings. Thus our decision does not prevent the Association from bringing evidence relating to whether Mr. Bellmore had made the alleged comments.

12. No one proposed that counsel for the Association be permitted to look at the notes on condition that he undertake not to reveal the Service's bargaining strategy or to use them for ulterior motives (see *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659 at paragraph 18). Consequently, we did not have to address the difficult question of whether it would have been appropriate in the circumstances of this case to release the type of notes at issue here to counsel who was also the party's chief negotiator.

13. While the Association of course has the right to make its case in the way it considers most effective, there are limits. One limit which is constant in all cases is the prejudice which might occur to the opposing party in admitting otherwise relevant evidence; where the relevancy of the evidence is tenuous, the potential for prejudice must be considered even more carefully. In addition, in this case, those limits include the need to maintain the integrity of the collective bargaining regime. We are most reluctant to risk undermining that system which reflects the labour relations policy of the Legislature, particularly where the advantage to the party which benefits from disclosure of documents is minimal.

14. The hearing was scheduled to continue on September 16 and 17, 1986, on the agreement of the parties.

2728-85-R Labourers' International Union of North America, Local 625, Applicant, v. 407689 Ontario Limited carrying on business as **Chatham Concrete Forming**, Respondent, v. Group of Employees, Objectors

Certification - Petition - Most senior employee - working foreman preparing and circulating petition in workplace - Employee perception of management involvement causing Board not to give weight to petition - Discussion of Board treatment of petitions

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members S. O'Flynn and I. M. Stamp.

APPEARANCES: David Strang and Victor Claro for the applicant; F. Stewart Harris and Albert Postma for the respondent; Pasquale Melillo for the objectors.

DECISION OF THE BOARD; April 1, 1986

I

1. The name of the respondent is amended to read: 407689 Ontario Limited carrying on business as Chatham Concrete Forming.

2. This is an application for certification brought pursuant to the construction industry provisions of the *Labour Relations Act*.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America Ontario Provincial District Council.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The Board further finds, pursuant to section 144(1) of the Act, that all construction

labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

II

6. The lists filed by the respondent employer indicate that there were nine individuals actively at work on the day the application was made. Another person, whose name appears on Schedule "B", was apparently working "part-time" or on an "occasional" basis around the time the application was made. He was not actively at work on the application date. Two other persons, whose names appear on Schedule "C" were "laid off" in December and had not been rehired by the application date.

7. In the construction industry, work opportunities and employment relationships are always somewhat uncertain. The work ebbs and flows, depending not only on an employer's success in attracting new business, but also upon the weather or the performance of other contractors who must complete their work first. The size of the crew fluctuates, depending upon the needs of the day. Workers move from job to job and employer to employer. A competitive bidder at the height of the construction season may employ dozens of workers. During the winter that same company may have no employees at all. Because of this fluctuating work force, the Board's focus in certification applications is upon those individuals actually at work - that is, actually *in* the bargaining unit - on the application date. The Board need not and usually does not have regard to any increase in the number of employees in the bargaining unit after the application was made (see section 119(2) of the Act).

8. On that basis, then, the employees in the bargaining unit would be the nine individuals listed on the respondent's Schedule "A". However, when this application came on for hearing before the Board on Friday, March 14, 1986, the union challenged that list on two grounds. The union contended that Wouter Postma is properly characterized as an equipment operator, not a "labourer", and thus should be excluded from the "Labourers' bargaining unit". The union further argued that Pasquale Melillo, a "working foreman", exercises managerial functions within the meaning of section 1(3)(b) of the Act. The union urged the Board to appoint a Labour Relations Officer to inquire into the duties and responsibilities of the disputed individuals and to adjourn the proceeding until the list was settled.

9. The Board declined to adjourn the proceeding or appoint an Officer at this stage. The representatives of the employer and the objecting employees had come from out of town and were prepared to proceed. That appeared to be the most expeditious course of action. There was no reason why the Board could not determine Mr. Melillo's status that day; moreover, it was apparent that whether or not the disputed individuals were included in the bargaining unit, it would still be necessary to consider the employee petition objecting to this application.

III

10. In support of its application for certification, the trade union filed documentary

evidence of membership on behalf of more than fifty-five per cent of the employees of the respondent in the above-mentioned bargaining unit. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness ("the collector") and indicate that a payment of one dollar has been made to the union in respect of its membership fees. The one dollar payment is in the nature of consideration and confirms the act of signing.

11. The documentary evidence is supported by a properly completed Form 80, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing or to suggest that, by so doing, the employees were not indicating their desire to be represented by the applicant union. The form and contents of this documentary evidence are consistent with the requirements of section 1(1)(l) of the Act and, as well, it meets the form and time limits prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of "membership support" in excess of that required by section 7(2) of the Act, for certification without recourse to a representation vote.

12. There was also filed with the Board a "statement of desire" or "petition" signed by a number of employees indicating that they wish to oppose the certification of the applicant. This petition included the names of certain individuals who had previously signed membership cards and paid one dollar in respect of membership fees, and, therefore, were "members" of the union within the meaning of section 1(1)(l) of the Act. These individuals had had a purported change of heart, and now allegedly no longer wish to support the applicant's certification. If the change of heart was a voluntary one so that the union's documentary evidence might not accurately reflect the employees' subsequent or current wishes, the Board would ordinarily exercise its discretion to order a representation vote to resolve the question of the applicant's certification. This is the course of action urged upon us by both the respondent employer and the employee objectors. They, in effect, argue that, in the circumstances of this case, the formalities required by the Act and the Board (writing, signatures, consideration, witnesses) are still insufficient to indicate the employees' real intentions - even though in a commercial context they might be quite sufficient to create binding and enforceable contractual obligations.

IV

13. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and

to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a “union member” and the “question” the Board was to ask itself in this regard which prompted section 1(1)(l)). Indeed, there are now quite a number of Board decisions dealing with union membership evidence, as the Board has sought to apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases - as, for example, where the one dollar payment is loaned to a potential union supporter, or where the card is not properly witnessed, or where the card is valid on its face but has been obtained through misrepresentation or intimidation, or where there is a problem respecting one or a few membership documents but not the others, etc. Representation votes are a residual mechanism resorted to where the union cannot demonstrate a “clear majority” (i.e., more than fifty-five per cent) or where, in the Board’s discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

14. However, neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. While in some jurisdictions the statute precludes or inhibits such expressions (British Columbia, Canada) so that certification is based solely on membership cards, and in others they are irrelevant because the preferred method of testing employee wishes is a representation vote, Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely “petition” or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

15. The Board recognizes that “statements of desire” (see Form 6), usually in the form of a “petition”, are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is no statutory declaration similar to Form 9 or Form 80, attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice. And, in any event, as we have already noted, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and the petition contains the signatures of a sufficient number of persons who have previously signed union membership cards that there is some doubt whether these “members” (in accordance with section 1(1)(l)) continue to support its certification.

16. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective

bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. And lest it be thought that the identification of union supporters and opponents is neutral information, one must remember that the Legislature does not regard it that way. Section 111 of the Act is designed to preserve the secrecy of the employees' choice. The Legislature has recognized the employees' concerns and sensitivities. Indeed, so has the respondent in the instant case. Mr. Postma, a co-owner, testified that when an employee offered to single out those who had signed union cards, Postma quickly interrupted and asserted that he did not want to know.

17. Frequently, as in the present case, anti-union petitions are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board's experience there are enough instances where employers have committed unfair labour practices, or have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable. Again, that is why the Act preserves the secrecy of union membership.

18. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

Reference might also usefully be made to the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, wherein the Board has recently reaffirmed its approach to such employee statements.

Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involve petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures places on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC 16,264, made the following observations:

• • •

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

V

19. In the instant case, the petition was prepared and circulated by Mr. Melillo who is a “working foreman” and the company’s most senior employee. However, the term

“foreman” is a little misleading because Mr. Melillo has little of the authority typically associated with management. He does not hire or fire employees, nor effectively recommend such decisions. He has no significant influence with respect to layoffs, recalls, promotions, employee wages, or discipline. There is no evidence that he has the authority to grant time off or authorize expenditures for tools or equipment. No doubt he *does* have a special relationship with the company and its owners as well as the employees. Typically, he is the only person supervising their work and giving them directions on the job. But this, in itself, is not enough to make Mr. Melillo “managerial” within the meaning of section 1(3)(b) of the Act. The employer, and Mr. Melillo himself, both assert that he is not “managerial”. We agree.

20. But that is not the end of the matter. As we have already noted, the real difficulty in this case is not whether Mr. Melillo is “managerial”, but rather whether the employee petition expresses the free and voluntary wishes of those who signed it; and, in particular, the more current wishes of the employees who, only a short time before, indicated their unequivocal support for the union. In that regard, Mr. Melillo’s own testimony is instructive.

21. Mr. Melillo testified that he first learned of the union’s organizing efforts when the company posted the Board’s Notice to Employees. He and his wife drafted the petition, which he brought to work on Friday, February 14th. The employees typically report to work at the company’s shop before being sent to the various job sites. Mr. Melillo decided that he would approach employees at the shop to see if any of them were opposed to the union.

22. Usually, Mr. Albert Postma, the co-owner of the company, is also in the shop every morning. He was there that day as well. As he walked into the shop area he was met by Mr. Melillo who was in the process of talking to the employees. Mr. Melillo asked Mr. Postma to leave, indicating that the employees were having a discussion. Under ordinary circumstances such request would be most unusual, but Mr. Postma did leave. He told the Board that he had a pretty good idea that Mr. Melillo and the employees were discussing the union and he had been instructed by his lawyer not to become involved. He also told the Board that when an employee had approached him the previous day and began to name the union supporters, he (Postma) told the employee that he did not wish to know. He recognized that the choice was for the employees to make, and that any overt effort by the employer to identify union supporters or influence employee wishes might be construed as an unfair labour practice. He said nothing to the employees on the morning of February 14th. However, his appearance and immediate departure took place in full view of all of the employees then present.

23. After Mr. Postma left, Mr. Melillo continued his brief discussion with the employees. He told them that he did not want to pressure them one way or the other. They could sign the document opposing the union, or refuse to sign if they so wished. Mr. Melillo then left the room because (he told the Board) he was a “foreman”, and he was concerned that if he remained, employees might be swayed by his position and opinions. He decided that the wisest course was to leave, as Mr. Postma had done. However, unlike Mr. Postma he returned a few minutes later to retrieve the petition and find out who had signed it and who had not. He may have left the room because of a concern that his presence, status as “foreman”, and expressed opposition to the union might unduly influence employees to sign a document which did not really express their true wishes; but, that influence was unavoidable so long as he would know who had signed and who had not. And, of course, the whole episode occurred within a few minutes of Mr. Postma’s appearance and uncharacteristic departure.

24. In the circumstances of this case, and in the absence of evidence from any other employee, we are not inclined to disagree with Mr. Melillo's own assessment of how the employees would regard him. While he is not "managerial" in the sense contemplated by section 1(3)(b) of the *Labour Relations Act* and is, therefore, a member of the bargaining unit, he nevertheless does have a different role in the company and a special relationship with its owners. That role could, and in our view reasonably would, influence trade union supporters to sign the document presented to them rather than expose their union allegiance by refusing to do so. That is why he left the room after presenting employees with the anti-union document. But merely stepping out of the room does not remove the concern which, we repeat, Mr. Melillo himself identified.

25. We are not prepared to give weight to the petition as a reliable indicator of the wishes of the union members who signed it. We hasten to add, however, that in making this finding there is no suggestion whatsoever of any employer misconduct or impropriety. It is simply that, on the facts, we are disposed to give predominant weight to the documentary evidence of union membership.

IV

26. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 17, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

27. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

28. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1695-85-U Clive Edwards, Complainant, v. United Steelworkers of America, Respondent, v. Dominion Bridge - Ontario a unit of AMCA International Limited, Intervener

Duty of Fair Representation - Unfair Labour Practice - Union not grieving change of job assignment - Not taking discharge grievance to arbitration - Whether breach of representation duty

BEFORE: *Judge R. S. Abella, Chairman.*

APPEARANCES: *Clive Edwards, Complainant, Brian Shell and David Martin for the Respondent, and W.J. McNaughton and D. Putnam for the Interveners.*

DECISION; April 8, 1986

1. This is a complaint by Clive Edwards that he was dealt with by the respondent contrary to the provisions of section 68 of the *Labour Relations Act*.
2. Edwards had been employed by Dominion Bridge since February 1980 as a structural steelfitter's helper. After being away from work on Workers' Compensation for one year and 2 months, he returned in June, 1982. On his return to work, he was first assigned sweeping duties. He did not object to this work assignment at the time because he hoped it was temporary. This assignment continued for three months until Edwards was laid off in November, 1982.
3. In September, 1984, Edwards was recalled to work and was immediately assigned sweeping work. The job was not reclassified and he received the same rate of pay. He protested this assignment to the shop steward, union president, foreman, general foreman and the employer relations supervisor.
4. No other structural steelfitter's helper was assigned to sweep floors as the major part of his work, although all steelfitter's helpers did some sweeping. In principle, Edwards objected to sweeping floors. He felt that by assigning him a sweeping job, a job not part of his job description, he was being constructively demoted. Moreover, Edwards felt the assignment was particularly demeaning because he is black.
5. He approached Bob Glencross, the shop steward to grieve in accordance with Article 6:02 of the collective agreement. Glencross advised him in essence that there was no point in grieving because the company was within its rights pursuant to the collective agreement to assign the sweeping work. Glencross did not prevent him from grieving but made it clear that the union would not likely take the grievance because it would be unsuccessful.
6. Edwards then went to the then president of the union who told him the same thing. Edwards felt at the time that without the union's support and involvement he was effectively precluded from grieving.
7. His next step was to approach the personnel manager of the company, a Mr. Putnam, who was able to intervene to the extent that on one night's work, Edwards was not

given sweeping exclusively. The next day, November 2, 1984, when he arrived for work, he found his locker broken into and learned that he was suspected of bringing a bomb to the company. He was disturbed by what he considered this act of harassment. That morning, he was again told to sweep the floor by his foreman. He refused and was told to go home.

8. The following Monday, he was again assigned to do sweeping. When he refused, he was sent to the personnel department where he was given three choices - to quit, sweep the floor, or be fired. He said he would neither quit nor sweep and was fired by Putnam.

9. One week later he approached Pat Gallagher, the local President, who assisted him in filing a grievance. Gallagher advised him to state merely that the grievance issue be stated plainly as "Penalty is too severe". Edwards was not content with the simplicity of language and added more of his concerns, including the fact that he was given "redundant and inconsequential work".

10. About one week later, he was called to attend a step 3 grievance meeting with the union and company. To his consternation, the union did not deal with the issue of his demotion, but tried only to get Edwards his job back on the same terms, namely, that he would be sweeping floors. The union tried to persuade him to take back his job but he refused if it meant sweeping. His refusal continues to this day.

11. The union then wrote to Edwards asking him to come to a general meeting to discuss whether they should go to arbitration since the company had decided against reinstatement. At the meeting, Edwards felt intimidated. Of the 20 people there, at least 10 were members of the union executive. The union's position at the meeting was that the matter should not go to arbitration on the grounds that Edwards should have accepted his job back when Putnam offered it to him. Edwards spoke briefly at the meeting, feeling that the atmosphere was so negative towards him that there was no point in speaking for a long time. He told the meeting that he was entitled to a hearing by an arbitrator and that the case had some merit. By a vote of 11 to 9, the membership decided against arbitration.

12. Edwards was the only steelfitter's helper left in this area after a series of lay-offs. He was also in the lowest classification of any employee in this area. His complaint is that in assigning him to sweeping, the company was demoting him, that he had a right to refuse to do the work, and that the union had an obligation to pursue his grievance to arbitration. He considers the union's conduct to have been arbitrary, complicit in the Company's improper work assignment, and a violation of the union's duty of fair representation. He alleges neither discrimination nor bad faith. No evidence was called by the Company or the union. Edward's evidence was credible and articulate. The issue remains whether the union was in breach of Section 68 in refusing to take a grievance for the sweeping work assignment, what Edwards calls the constructive demotion, and in refusing to go to arbitration over his dismissal.

13. When Edwards discussed with Gallagher the concerns over sweeping, Gallagher explained that the company was not in violation of the terms of the collective agreement, had the right under the agreement to so direct its workforce, and to assign sweeping work because it was below Edward's classification. According to Edwards, Gallagher seemed to understand the issue. His discharge grievance was in fact processed within a week and Edwards does not suggest that the union was being, at this stage, unhelpful or unsupportive of the discharge issue.

14. At the 3rd step meeting, the union asked the company for the job back, but Edwards interjected that he would refuse to sweep. When the company was out of the room, the union representatives at the meeting tried to persuade him to take his job back because he would lose at arbitration on the grounds that the company was within its rights.

15. At the general meeting, a rather turbulent one according to Edwards, no one stopped Edwards from speaking. Gallagher told the meeting that Edwards had refused the work assignment and the union had no choice but to end the process. Although it is clear that the executive did not want the grievance to proceed to arbitration and made a motion to this effect, there is no evidence or suggestion that Edwards was precluded from trying to persuade the membership to the contrary. That he was unsuccessful in doing so is not evidence of the unions' arbitrariness, merely of their ability at an open meeting to persuade more people than did Edwards of the correctness of their decision.

16. As to the issue of his having to do sweeping and requesting Glencross' assistance in filing a grievance over this issue, Glencross explained that a grievance was fruitless because the company was within its rights. Edwards does not allege that Glencross was being hostile or unreasonable. Rather, he felt that Glencross was wrong and had an obligation to take the grievance. He was disappointed in Glencross' response but decided not to do anything about it because he was glad just to have a job and hoped it would work out over time. Edwards is aware that the Steelworkers do not take every grievance, that they make a judgment call depending on the merits of each case. But he felt that only an arbitrator could decide the issue and that the union should have processed the case whether or not they thought it was a good one. He was upset by Glencross' and Gallagher's interpretation of his rights and assumed that they simply did not want to be bothered with his demotion. He alleges no bad faith or malice. On at least one previous occasion, Glencross had launched a grievance successfully on Edwards' behalf.

17. Edwards feels the company action was "immoral". He feels that he was being punished by the company for being on Worker's Compensation. He also feels he was racially discriminated against by them and has launched a complaint before the Ontario Human Rights Commission. He never told either Glencross or Gallagher or any other union official of these theories nor did he give them any facts or assumptions which would cause them to investigate such allegations. He complained to them only about the fact of being assigned sweeping, never referred to it as a demotion issue, and gave them no cause to see it as other than an assignment by which he was instinctively and personally troubled. With the information the union had, it concluded that the company was within its rights to assign the work, that Edwards had no right to refuse it, but that the penalty of discharge was too severe and they would try to get his job back. That they could not, is not through their own want of trying but through Edwards' refusal to accept what was to him an unpalatable assignment.

18. Edwards position has consistently been that he would not take the job if it meant sweeping. He knew there would be some consequences if he refused to sweep but he was prepared to take the risk.

19. It is clear that a union has the duty of fair representation and that by statute, it must not act in a way which is arbitrary, discriminatory or in bad faith. It is a serious responsibility because, as Edwards points out, the union has carriage under a collective

agreement to protect individual employees who assign to their bargaining agents any personal voice they might otherwise have had in dealing with a company over grievances.

20. In this case, however, there is no evidence that the union violated that duty, either in process or in substance. The union listened to Edwards' concerns, advised him of the limits of his and their rights under the collective agreement, and tried to get his job back when he was discharged.

21. Based on what it knew, the union was not arbitrary. They exhibited no hostility or malice towards Edwards, and genuinely attempted to represent him when they felt the company had behaved with excessive discipline. On an objective assessment of the facts within their knowledge, they exhausted the possible available remedies and stopped only when to continue further would have been, in their view, a pointless exercise. Far from being arbitrary, the union was prepared to assist Edwards in any way it could within the limits of the agreement. It is clear from the jurisprudence that an employee does not have an absolute right to arbitration and that the right to take a grievance is reserved to a union. Where, as here, the discretion is exercised in good faith and in a responsible and reasonable manner, there is no violation of the duty of fair representation.

22. The complaint is therefore dismissed.

3483-84-M Ontario Sheet Metal Workers Conference, Sheet Metal Workers' International Association, Local 269, Applicants, v. **E. S. Fox Ltd.**, Ontario Sheet Metal and Airhandling Group, Respondents

Construction Industry Grievance - Damages - Union referring member returning from injury and Workers' Compensation - Whether denial of employment violation of agreement - Whether employer entitled to seek further medical evidence - Whether duty of mitigation requiring acceptance of modified work

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. P. Wilson* and *H. Kobryn*.

APPEARANCES: *Bernard Fishbein*, *Leo Lavallee* and *George Ward* for the applicants; *W. J. McNaughton* and *M. Brousseau* for the respondent *E. S. Fox Ltd.*; no one for Ontario Sheet Metal and Airhandling Group.

DECISION OF THE BOARD; April 30, 1986

1. This is a grievance referred to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. It concerns the respective responsibilities of the parties when a construction employee with a prior history of back problems is referred to an employer through the hiring hall.

2. The grievor, Mr. Fred VanLingen, had previously worked for the respondent sheet metal contractor in 1982. In December of 1982, the grievor was working in the respondent's shop in Kingston, when he slipped on a piece of pipe and hurt his back. That injury kept the grievor off work and on Workers' Compensation benefits until March of 1983. At that point the grievor attempted to resume his duties in the respondent's shop, but after 3 weeks had to go back on Workers' Compensation.

3. The grievor did not make a further attempt at resuming work until December of 1983. At that point he was seen by a Workers' Compensation Board doctor, and advised that he would likely be fit to resume normal duties in another three months. In the meantime, he was advised to attempt modified employment, if such were available. The only notification to the company, however, came in a letter from the Workers' Compensation Board dated February 21, 1984. That letter made no mention of a prognosis for resuming normal employment, but rather stated only the following:

E S Fox Limited
209 Dalton Ave
Kingston
Ontario
K7K 6C2

Date: 21FEB84

Accident Date: 20DEC82

Injury: Not known

Dear Sir or Madam;

Claim No: C 14078847 Vanlingen Fred
Your Reference No: 3037

Medical information shows that your worker is no longer totally disabled because of the compensable condition. We consider that this employee is capable of performing *modified* employment as of 13FEB84. If suitable employment is not available, the Workers' Compensation Act provides that an injured employee shall receive the equivalent of full disability benefits while partially disabled. For your information and convenience, the provisions of Section 41 of the Act are printed on the reverse.

We have asked the worker to discuss the type of work which is required with the attending doctor and also to determine from you if it is available. We have emphasized that the continuation of benefits depends upon the worker's co-operation and availability.

Any assistance which you can provide in bringing about an early return to work will be appreciated.

Yours very truly,

“M. MacLean”

M. Maclean
Telephone: (416) 963-0804

When writing the Board be sure to quote Claim No. C 14078847

(emphasis added)

The grievor did not resume any form of work with the respondent at that time, but rather in March began working off and on for another sheet metal contractor in the area, Andreynolds. From June of 1984 that employment became continuous, on a shopping-mall project, and the grievor's Workers' Compensation claim was finalised. From that point on the grievor no longer appeared on the respondent's monthly Workers' Compensation cost statement.

4. The grievor's job with Andreynolds ended in December of 1984, and he went on the Local's out-of-work list. When the respondent subsequently put in a request for sheet metal workers for a Proctor & Gamble job in Belleville on February 26, 1985, the grievor was Number 1 on the Belleville list. Mr. Lavallee, the applicant's business agent, advised the respondent's foreman, Reg Smith, of the names of the men that he would be referring. It is not clear how many men were being referred at that time, but in any event, the grievor's name was among them.

5. The respondent at this point had just commenced a program to monitor and attempt to control its Workers' Compensation costs, and one aspect of that program was for all field staff to make an effort to find “light duties” for employees who required them. Mr. Smith was aware of the grievor's prior back problem, and telephoned Head Office in Welland for instructions. A company vice-president, Mr. Bernard Royal, consulted the company's file on the grievor, and advised Mr. Smith that he was “in no way” to allow the grievor to commence working on the Proctor & Gamble job site. The company's evidence is that this was a heavy

industrial job, involving both the removal and installation of a ventilation system, and that in terms of lifting, bending and twisting, it was more strenuous than, say, a commercial job like a shopping mall. The applicant's witnesses testified that this was not necessarily the case. However, it is clear that the work available to be done on the Proctor & Gamble job site could in no way be described as "modified" work.

6. Following his telephone conversation with Mr. Royal, Mr. Smith called Mr. Lavallee to advise him that the grievor would not be permitted on the job because of his back. Mr. Lavallee pointed out that the grievor had been working on construction for 6 months without a problem. Mr. Smith asked Mr. Lavallee if the union was prepared to underwrite the Workers' Compensation costs if the grievor injured himself on the job and never worked again, and Mr. Lavallee indicated that he was not.

7. When the grievor himself reported for work that morning, he was advised by Mr. Smith that he could not go on the job. Mr. Smith explained that because of his back injury, the work on the Proctor & Gamble job presented a hazard to him. Mr. Smith was not himself aware of the February 1984 letter that the company had, and made no mention of it. The grievor responded that he had a doctor's clearance, and that he had worked on the Quinte Mall for Andreynolds for 6 months with no problems. Mr. Smith stated that he had himself taken a course on back injuries, and that they never really clear up completely. He then added that the company could find a job for him in the shop in Kingston that would not be a hazard for him. To that the grievor responded that he was Number 1 on the list for Belleville, and did not feel that he had to drive an extra 2 hours a day to Kingston. He added that that drive would be harder on his back than anything else would, and also that the other men in the shop did not always help with the lifting. Mr. Smith said that he was sorry, but those were his instructions. The grievor testified that no elaboration was given as to what would be expected of him in the shop, and he did not ask.

8. On March 5th the respondent made a further request for men, and the union sent the grievor and Al Hale to the job. When Mr. Smith saw the grievor re-appear, he simply told him that nothing had changed, and that he was not going on the job. Mr. Hale commented that the grievor had worked under him at the Quinte Mall for 6 months, and had had no difficulty. He warned Mr. Smith that there would be trouble over this.

9. On April 5th the respondent again needed men, and again the grievor was sent. This time he was greeted by the respondent's Kingston area Sheet Metal Manager, Maurice Brousseau, Mr. Brousseau having by that time returned from vacation. In contrast to the earlier conversation of Mr. Smith, who was simply carrying out instructions, Mr. Brousseau had in his possession the company's last letter from the Workers' Compensation Board, of February 21, 1984. Mr. Brousseau showed the letter to the grievor, and referred him to the phone number and name at the bottom of it. Mr. Brousseau suggested that the grievor contact the Workers' Compensation Board, and that if he was all right and off modified work, an indication to that effect ought to be forthcoming. Mr. Brousseau made it clear, in other words, both to the grievor and in his evidence before the Board, that as soon as he had unqualified medical clearance, he could go to work on the Proctor & Gamble job.

10. With this information both the grievor and the union took steps to satisfy the company's condition. They immediately contacted the Kingston branch of the Workers' Compensation Board, and requested confirmation of the grievor's present status. They also

requested that the reply be in a form that could be taken to the job site and used for any employer. That reply read:

April 12, 1985
C14078847T

When writing the Board please quote the above file number

TO WHOM IT MAY CONCERN:

This will confirm that upon review of the claims file Number C14078847T for Mr. Fred VanLingen, it is evident that Mr. VanLingen was capable of returning to his regular job as a sheet metal worker without any limitations imposed upon him by his compensable disability, effective June 18, 1984.

Temporary Total Compensation Benefits to this worker were finalized June 18, 1984 accordingly.

“J. Vance”

Jim Vance,
Co-ordinator
Kingston Information Service Office.

This letter was immediately given to the respondent. The respondent, however, was not impressed by the “To whom it may concern” designation, and also read the letter as simply attempting to draw conclusions on the basis of the record of benefits. The company therefore decided on July 9th to seek further clarification and confirmation of the grievor’s medical condition from the Board’s Head Office, where employees’ full files are kept. There is no explanation before the Board as to why the company waited until July 9th to make that request. In any event, the company received the following reply from the Board’s Head Office, which it still considered to be ambiguous and unsatisfactory:

July 26, 1985

E.S. Fox Limited
209 Dalton Avenue
Kingston, Ontario
K7K 6C2

Attention: Charles E. Turner,
Manager, Eastern Ontario

Dear Mr. Turner:

Claim C14078847 - VANLINGEN, Fred

The above mentioned worker, after it was found that he was fit for modified work, was placed with the Vocational Rehabilitation Division to assist him in seeking suitable modified

employment. Mr. Vanlingen has been employed since June 18, 1984. No further benefits have been paid since that date.

I trust this information is satisfactory.

Yours very truly,

“G. Golz”

G. Golz (Ms.)
Claims Adjudicator
Claims Adjudication Branch.

It is our understanding from the parties' comments, however, that the assignment of the grievor to the job in question had by this time ceased to be an issue.

11. What were the respective rights of the parties in the above factual situation? For guidance, both parties referred the Board to its relatively recent decision in *Ontario Hydro*, reported [1983] OLRB Rep. Jan. 99. There the Board had to decide whether an employer, faced with the typical hiring-hall provisions of a construction industry collective agreement, retained the right to decline to employ an individual alleged to have an affiliation with the terrorist wing of the Irish Republican Army. The relevant provisions in that collective agreement provided:

SECTION 7 EMPLOYMENT PRACTICES/HIRING

• • •

701 Hiring and Layoff

- A. The employment and layoff of tradesmen and apprentices, excluding key tradesmen, shall be carried out on the following basis and sequence:
 - (i) The Employer agrees to hire and employ only members of the International Brotherhood of Electrical Workers on all electrical work. The EPSCA office will request the appropriate Local Union office for certified tradesmen and apprentices required and no one will be employed unless they are in possession of a clearance card from the Local Union office.
 - (ii) If the Local Union is unable to furnish certified Local Union or travel card members to the Employer within three (3) working days of the time the Local Union office receives the request for tradesmen (excepting Saturdays, Sundays and Holidays), the Employer shall be afforded the right to employ certified tradesmen (travel card members or permit holders) as are available. The Local Union will issue clearance cards to tradesmen hired in these circumstances. All employees shall register with the EPSCA office prior to commencing work. Travel card members may be replaced by Local Union members and permit holders may be replaced by Local Union members or travel card members who maintain a regular residence in the geographic area of the project after three (3) working days' notice to the Employer, but in no case until a tradesman has worked a minimum of one week.
- B. In all cases of layoff, except as noted in the Local Union 1788 Appendix, the Employer shall layoff its employees in the following sequence:
 - (i) permit holders;

- (ii) travel card members;
- (iii) Local Union Members.

C. When possible, the Employer shall notify the Local Union Office three (3) days prior to layoff.

After reviewing a number of the cases, the Board set out its approach as follows:

32. The other approach, and the one we prefer, is to recognize that this collective agreement was negotiated in the context of the construction industry and that the words of the collective agreement in issue pertain to one of the hallmarks of the construction industry, the hiring hall. The nature of a hiring hall is to a large degree a function of two labour relations realities in the construction industry. The first is the fact that this collective agreement and others in the construction industry generally pertain to "certified tradesmen or journeymen". The word "journeymen" is said to have originated in the railroad industry where a journeyman was considered a totally competent craftsman who could take his tools and apprentice and travel to remote parts of a railroad to perform his work as a skilled craftsman essentially on an unsupervised basis. A "journeyman" or "tradesman" need not be described as a "skilled journeyman" or "skilled tradesman" because the word journeyman or tradesman already denotes the highest level of skill in a trade. In short, the term journeyman or tradesman refers to a person who can work with little or no supervision and who represents the highest level of proficiency in a craft. See *Swinerton and Walberg Company* (1977), 68 L.A.C. 940 (Schedler). The notion of "certification" pursuant to legislation requiring the training and certification of tradesmen is today a further guarantee of proficiency. Thus persons who constitute certified tradesmen or journeymen and who are referred to an employer by way of a hiring hall provision cannot be considered untested and untried potential hires "from the street" as in a manufacturing or service context. Because journeymen and tradesmen are expected to have a minimum level of proficiency, an inference that the employer has agreed to fetter its hiring discretion, or subject it to arbitral review, is not *prima facie* an unreasonable conclusion.

33. The second point giving rise to the nature of a hiring hall is the peculiar relationship between employer and employees in the construction industry as was discussed in the case of *R. M. Hardy and Associates Limited and Teamsters, Local Union 213*, [1977] 2 Can. L.R.B.R. 357 where the chairman, Professor P. C. Weiler, observed the following:

Most of the workmen in the construction industry are skilled tradesmen, usually having obtained tradesmen's qualification certificates after years of apprenticeship. Each of the distinctive trades has its own craft union, which may have a century-old tradition of representing its members in collective bargaining with the contractors who employ members of that trade. But most building trade unions have another role besides the customary representation of employees in collective bargaining: the hiring hall function. The reason is the highly cyclical nature of employment in the construction industry - stemming both from the rhythm of individual projects and the intermittent and erratic pattern in which major construction investments are brought on stream. In response to that pattern, contractors - whether general or specialty contractors - normally do not maintain a regular work force. They may retain a nucleus of key employees, but the bulk of their workmen are recruited as and when they are needed for a specific project for which the employer has obtained a contract. Where do they get these tradesmen? Through the union which represents that craft. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site. *In effect, the trade union performs the basic personnel function in the construction industry, by allocating jobs among the members of the work force.* Any one tradesman may be employed by a number of contractors in a number of areas in any one year. Besides paying the immediate take-home wages to the tradesmen on the job, the contractor also forwards

directly to the union hourly contributions for health and welfare, vacation, and pension benefits, and these funds are administered by the union for its members. And the consequence is that the primary and enduring relationship in construction is between craft unions and tradesmen-members, not between employer and employee.

(our emphasis)

And then, on the basis as well of the reasonable inferences to be drawn from the language of the collective agreement before it, the Board concluded at the end of paragraph 35:

... on the wording of this collective agreement and construing it in light of construction industry practices, we have come to the conclusion that the employer does not have an unbridled right of rejection in dealing with certified tradesmen referred to it pursuant to section 701. It has given up the broad discretion it might otherwise have had in agreeing to this particular hiring hall provision.

The Board went on in paragraph 36 to note, however:

... But must all other tradesmen referred be hired? What if a referred tradesman is intoxicated or from past experience believed to be unreliable or incompetent notwithstanding his certification? Were we to hold such an obligation existed, the employer would be required to employ the individual first and then immediately terminate on the basis of the documentation it had before it. Reading the collective agreement as a whole, it is our opinion that in agreeing to Section 701 the parties did not intend such a result. The requirements of section 701 and the acknowledgement of the parties in section 7, paragraph C that reliable and competent union members will be referred and employed are best met by implying a right in the employer to reject persons it believes to be unreliable or incompetent or otherwise unqualified subject to acting reasonably, in good faith and without discrimination. We point out that Section 1301 makes clear that "an employee" who has been discharged or otherwise disciplined for cause may take advantage of the "just cause" standard required by that section. On the facts before us, the grievor, Mr. Gilroy, was a tradesman referred for employment but actual employment was not forthcoming. While the parties did not specifically agree to an unbridled right in the employer to reject, they also did not agree to subject rejections to the section 1300 standard of "just cause". Rather, the act of hiring under this construction industry agreement is very similar to the act of promotion in an industrial context. With respect to the latter function, and in order that seniority rights not be capable of unilateral abrogation by an employer, arbitrators have inferred the contractual obligation that management's responsibility to assess employee qualifications be exercised reasonably, in good faith and without discrimination.

12. In the present case, the relevant provisions read:

ARTICLE 6 - MANAGEMENT'S RIGHTS

6.1 The Union agrees that the employer has the exclusive right to manage the enterprise and to exercise such right without any restrictions save and except as are set out in this Agreement. Without restricting the generality of the foregoing it is agreed that it is the exclusive function of the employer:

- to hire, transfer, assign work, promote, demote, lay-off, discipline and discharge employees for just cause, and to increase or decrease the working force from time to time.
- to determine materials, parts, components and assemblies to be used, design of products, facilities and equipment required, to prescribe tools, methods of performing work and the location of equipment, and the scheduling of work.

6.2 The management rights expressed herein shall not be exercised in a manner inconsistent with the provisions of this Agreement.

* * *

ARTICLE 21 - HIRING PROCEDURE

Refer to Clause 7 of Local Appendices

21.1 The Union hereby agrees to furnish at all times to the employer, duly qualified members and registered apprentices as the work requires, in such numbers as the employer shall determine to be necessary to properly execute the work he has contracted for, in the manner and under the conditions specified in this Agreement.

21.2 Whenever after reasonable notice, (48 hours) excluding Saturdays, Sundays and Holidays, the local union is unable to furnish a sufficient number of such duly qualified members and registered apprentices recognized by the Union, to meet the requirements of the employer, then the employer may secure such additional sheet metal workers from other sources as may be necessary, it being understood that they shall be eligible and shall comply with the requirements of the Union and thus become covered by the terms of this Agreement.

21.3 The Union agrees that where members of a local union other than the local having territorial jurisdiction for the area and who are hired in the area in which the work is being performed, are working on a project that does not require more than five working days to complete, such sheet metal workers shall be allowed to finish the job without interruption from the local union. However if such sheet metal workers are on a job which will exceed five working days to finish they may be replaced by members of the local union having territorial jurisdiction where the work is being performed, at the earliest possible convenience.

21.4 Notwithstanding the above, any two duly qualified members sent by an employer to work on a project in the territorial jurisdiction of another local union shall be permitted to work without interference from any local union, for such period as the employer may require them to do so providing they comply with the terms and provisions of the local union to whose area they are reporting.

21.5 When an employee first reports to work with an employer, he shall give to the employer or his representative, the following documents:

- Social Insurance Number
- Journeymen must show proof of Ontario Certificate when required
- Apprentices shall prove certification of status and completed hours
- Referral slip
- OHIP form 104 (Where applicable)
- Union Check-off (Dues Deductions) Authorization Form (where applicable).

21.6 The Union agrees to supply journeymen sheet metal workers and/or apprentices only to employers who are covered by this Agreement.

ARTICLE 22 - DISCHARGE OR QUIT

22.1 When an employee is discharged for just cause or quits his employ of his own accord, he shall receive his wages and all other monies owing him. Together with his record of employment on the next regular pay following his termination.

And Clause 7 of the Local Appendix reads:

CLAUSE 7 - HIRING PROCEDURE

Refer to Article 21 Body of Agreement

7.1 The employer shall have the right to engage former employees in the past one year, if available, but otherwise he will accept journeymen or apprentices sent by the local union business manager.

13. Contrary to the position noted in the *Ontario Hydro* case, this collective agreement *does* contain in its *Management's Rights* clause, the explicit right to hire. On the other hand, under Article 21, the understanding is that the Union will "furnish" such "duly qualified members and registered apprentices as the work requires", and it is only if it is unable to do so within 48 hours that the employer may secure "such additional sheet metal workers from other sources as may be necessary". But as in the *Ontario Hydro* case, common sense suggests that the "qualified" members furnished by the Union will be fit to perform the work required, and we do not read even the language of Clause 7 of the Local Appendix as an express override in that regard. What Clause 7 specifically deals with is a limited right of the employer to "name-hire", and it would go against our collective experience to conclude that the language employed in that clause was intended by the parties to address any other significant issue. (We also note, as Mr. Fishbein concedes, that even if we were to find otherwise and allow a notional hiring, the union would still have to face the test of 'just cause' for termination under the agreement.)

14. The test remains, therefore, the one articulated by the *Ontario Hydro* case. And we also accept the recognition in the *Hydro* case that there is, in a construction hiring-hall situation, something akin to employment status even prior to the hiring. As the Board put it in *Ontario Hydro*, at the end of paragraph 34:

... whatever the legal significance of section 69, the court cases do suggest that in the construction industry and in like industries, there is in law, and without specific contractual wording to the contrary, a very close relationship between being in a hiring hall and having employment status. Precisely how close will depend on the circumstances of any particular case.

Similarly, we find the *Hydro* case's analogy with seniority rights apt:

37. Because a hiring hall provides the same "job security" in the construction industry as seniority does in a non-construction context, the two institutions are equally important and deserving of the same construction and interpretation by arbitrators. An unbridled management discretion to hire in the face of a hiring hall clause such as exists in this contract would be as undermining of that provision as would be an unbridled power to review qualifications to seniority rights in the unusual industrial collective agreement. On the other hand, full arbitral review as in discipline cases would not accord with Article 13 and be subject to the concern of excessive arbitral intervention. Accordingly, the approach outlined in *Reynolds Aluminum* is equally applicable to the response of employers to hiring hall referrals without specific wording to the contrary.

Indeed, contrary to the submissions and cases of the applicant, we see no valid reason why the situation that has arisen here in the construction industry ought not to be treated in a manner analogous to the return to work of an injured employee in the normal industrial setting: the interests to be protected from both the employer and employee side appear to be the same. And the notion of a construction employee having to show up at various job sites with a

clearance certificate in his pocket does not strike us as particularly unrealistic: that is exactly what the grievor and the union had in mind when they requested the “To Whom It May Concern” letter from the Workers’ Compensation Board. The only *real* difference, it seems to us, in the construction industry, is that in most cases the requisitioning employer will not *know* of the prospective employee’s injury record, and the issue simply will not arise. In addition, the Board must also give thought to the fact that the employment opportunity in construction may be short-lived in itself, in considering upon whom the onus may lie to deal with this problem in an expeditious manner.

15. In the normal employment setting, the right and the duty of an employer to require an employee to provide medical clearance prior to returning from (as here) a lengthy and serious injury, is well established. As it was put, for example, in the *Firestone Tire & Rubber Co.* case, (1973) 3 L.A.C. (2d) 12 (Weatherill), at page 13:

There is no doubt that an employer has both the entitlement and the obligation to satisfy itself as to the fitness of its employees to carry out the tasks to which they will be assigned. What is proper will depend, in each case, on the nature of the work and the circumstances to which it is to be performed. In *Re U.A.W., Local 525, and Studebaker-Packard of Canada Ltd.* (1960), 11 L.A.C. 139 (Cross), it was held that it was a paramount right of management to require that employees be physically fit to perform the work that they are required to do and to satisfy itself by medical opinion if necessary, that this is so. In *Re U.A.W., Local 89, and Reflex Corp. of Canada Ltd.* (Weatherill), referred to in *Re U.A.W., Local 27, and Eaton Automotive Canada Ltd.* (1969), 20 L.A.C. 218 at p. 220 (Palmer), the *Studebaker* case was approved and it was added that there must be reasonable and probable grounds for the imposition of such a requirement. In the *Reflex* case, it was said:

Clearly, where an employee returns from an absence due to illness, the occasion is proper for the company to require some certification of fitness. Where the certificate is not satisfactory, the company could properly require a further certificate, or could direct its own medical examination.

The passage quoted went on to note, however:

Such a procedure, however, must be carried out in accordance with ordinary principles of fairness. If, as in the instant case, the company is to reject the medical certificate offered by the returning employee, it must state the grounds for such objection, and must point out to the employee what it requires before it will permit his return. If the certificate in itself is not satisfactory, the employee must be advised of that, so that he may either protest the reasonableness of the company’s rejection of it, or request a more ample certificate from his doctor. If a further medical opinion is required, then again the company must advise the employee of that fact.

16. How do the facts in the present case measure up to the foregoing tests? Did the company, first of all, have reasonable grounds to be concerned about the medical condition of the grievor when he sought to be employed on the Proctor & Gamble job?

17. We find that it did. The last authoritative evidence it had of the grievor’s medical condition was the letter from the Workers’ Compensation Board of February 21, 1984, and that letter gave no hint that the grievor was fit for anything but modified work. The fact that the grievor was known to have gone off Workers’ Compensation benefits in June of that year tells the company nothing more: the grievor would come off benefits once regularly employed even if it was in fact only *modified* or light work that he had found. The passage of time in a given case is obviously of some relevance, as are the statements to the company by the

grievor and Mr. Hale that the grievor had been doing construction work with no problem. But the question is essentially a medical one, and the company still would have no firsthand knowledge of the demands that the other employment would have made on the grievor's back. The grievor had been on Workers' Compensation benefits up to June of 1984, had tried to come back to work unsuccessfully once before that, and in all had, to the company's knowledge, suffered a serious enough injury to have kept him off work for a period of 15 to 18 months. In all the circumstances, we do not find the company's requirement for some form of medical clearance for *unrestricted* work, within a period of eight months from the time the grievor's Workers' Compensation Board claim was finalised, and in light of the restrictions placed upon the grievor in the last correspondence the employer had had from the Workers' Compensation Board, to have been arbitrary, discriminatory or unreasonable. (We are assuming, from Mr. Brousseau's evidence, that that *was* the company's concern at that time. Mr. Royal did not testify, and we would note that any denial of the grievor's employment rights *simply because* he had previously had a compensable injury, would be a violation of the *Ontario Human Rights Code*, as amended by the *Workers' Compensation Amendment Act*, 1984 (No. 2), 1984 S.O. c. 58.)

18. That brings us to the comments of the board of arbitration in the *Firestone* case, about procedural fairness. Particularly, as we noted, with the fluid job situation in the construction industry, one can expect *both* parties in a situation of this type to act in concert, and to share whatever information they have, in an effort to obtain satisfactory medical clearance, either through the Workers' Compensation Board or independently, in as expeditious a manner as possible. Through no fault of his own, the communications by Mr. Smith to the grievor on February 26th and March 5th fall short in this regard. The only comment made to the grievor was that he had "had a back injury": the February 1984 letter was not known to Mr. Smith, and he did not alert the grievor to the existence of that problem. All the grievor knew is that he had been discharged by the Workers' Compensation Board, had tested his back, and had found it fine. We are, however, of the view that the company's offer of modified work in the shop, where the grievor had himself previously taken employment, ought to have been accepted and at least attempted by the grievor, while his status was being clarified, and in declining to do so, the grievor failed to make reasonable efforts to mitigate his damages. No damages would be payable in any event, therefore, for the limited period between the first and third referral.

19. The communication by the company on the first two referrals stands in marked contrast to that from Mr. Brousseau pinpointing the problem on the third referral of April 2nd, after which the grievor and the union did take steps immediately to attempt to clear the record. But that record is still a medical one. The letter from the Workers' Compensation Board's branch office does, we would agree, appear to reflect no more than a history of when benefits were payable. The company was therefore entitled to seek further clarification, in light of the letter that it had received in February of 1984. But if that is what the company required, there was an onus on it at that stage to act expeditiously, (*assuming* that the matter was still a live issue). To say nothing to the grievor or the union, and to make its own follow-up inquiry only on July 9th, does not meet that onus. We do not think that the grievor could be expected to have continued to drive to the Kingston shop indefinitely while the company unreasonably dragged its feet, and if liability for the Proctor & Gamble job is still an issue beyond the time that the company was in receipt of the letter submitted by the grievor on April 12, 1985, the Board is prepared to assess the value of that liability, should the parties be unable to agree.

20. The grievance is otherwise dismissed.
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1269-85-R Canadian Paperworkers Union, Applicant, v. Faber-Castell Canada Limited, Respondent, v. Group of Employees, Objectors

Bargaining Unit - Employer operating two locations in Metro three miles apart - Board applying criteria for community of interest - Including both locations in unit

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *W. H. Wightman* and *P. J. O'Keeffe*.

APPEARANCES: *J. J. Nyman* for the applicant; *J. C. Murray* for the respondent; *Brian McKenny* for the objectors.

DECISION OF THE BOARD; April 22, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant has applied to be certified as bargaining agent for employees of the respondent at 77 Brown's Line in Metropolitan Toronto. The respondent contends that the bargaining unit should be described in terms of all of its employees in Metropolitan Toronto, subject to certain specific exceptions. Such a bargaining unit would encompass not only employees at the respondent's plant on Brown's Line, but also employees at its plant at 1325 The Queensway. The two facilities are approximately three miles apart.
4. No evidence was led by the parties with respect to the matter of the appropriate bargaining unit. Rather, the applicant accepted as correct most of the written submissions relating to the relevant facts filed by the respondent. The applicant filed certain submissions of its own with respect to the relevant facts, some of which were accepted by the respondent. Both parties also filed submissions in the nature of argument relating to the conclusions the Board should reach on the basis of the agreed-to facts.
5. The respondent is engaged in the manufacture, packaging and distribution of writing instruments, particularly woodcase pencils, ballpoint pens and markers. Prior to October 1983 the respondent carried on both its manufacturing and packaging operations at its plant on The Queensway, while its executive offices as well as a finished goods warehouse were located at Brown's Line. Due to a shortage of space at The Queensway facility, in or about October 1983 the main packing operation was transferred to Brown's Line. In 1984 a new packing machine was installed at The Queensway, and since that time employees from Brown's Line have regularly been transferred on a temporary basis to The Queensway to operate the machine.

6. The respondent employs approximately 45 employees at its Queensway facility, most of whom are engaged in manufacturing. About 22 employees are employed in the packaging department at Brown's Line while six employees are employed in the warehouse area at the same location. Product is moved on a daily basis from The Queensway, where it is manufactured, to Brown's Line where it is packaged and stored. The respondent's intent is to find a suitable facility prior to the end of this year that will enable it to bring together at one location the functions now being performed at Brown's Line and The Queensway.

7. The respondent employs set-up mechanics at Brown's Line as well as two machinists who are based at The Queensway. In 1985 one of the machinists from The Queensway spent about 60 per cent of his time at Brown's Line training new set-up mechanics. This same machinist now spends about half his time at Brown's Line. The machinists travel from The Queensway to Brown's Line as necessary to do major repair work and the overhauling of machinery. The respondent's quality control employees are based at The Queensway and that is where they perform most of their work. However, at least once a week the quality control employees also work at Brown's Line.

8. As already noted, there is a packaging machine at The Queensway which is operated by employees from Brown's Line. Since January 1985, 25 employees have moved on a temporary basis from Brown's Line to The Queensway to work on this machine. The total amount of time worked by each of these employees varies between seven and 642 hours. Seven of the employees have worked in excess of 100 hours at The Queensway.

9. The respondent has a practice of posting job vacancies and encouraging employees who are interested to apply for the vacancies. A vacancy at one location is posted at both locations. Employees have moved from one location to another as a result of applications in response to such postings.

10. In 1982 the respondent laid off a number of employees. The respondent did so in order of reverse seniority, provided that those retained had, in its view, the skill and ability to do the available work. During the period of layoffs no senior employee from one location "bumped" a more junior employee at the other location. The respondent contends that it is not aware of any circumstances which would have enabled an employee to bump an employee at the other plant. The applicant also did not refer to any such situation. The respondent, on recalling employees, generally recalled them to the job at the plant from which they had been laid off. However, on at least one occasion, an employee laid off from Brown's Line was recalled to a job at The Queensway.

11. The conditions of employment, hours of work and fringe benefits are the same for employees at both locations. Jobs are graded by the respondent according to different levels of skill. Employees rated as being at the same grade level are paid the same, whether employed at The Queensway or Brown's Line. In that less skilled jobs are concentrated at Brown's Line, the Brown's Line employees on average tend to be lower paid than those at The Queensway, although there are some employees in the higher grade levels at both locations.

12. The respondent's senior executives are located at Brown's Line. However, the manufacturing manager, who is responsible for both manufacturing and packaging, is based at The Queensway. Below the manufacturing manager is the plant manager, who is also based

at The Queensway. The plant manager is responsible for manufacturing work performed in the respondent's woodcase division and plastics division as well as the packaging division. Because employees in the three divisions are divided between the two locations, the plant manager visits both locations on a daily basis. Supervisors of employees in the three divisions all report directly to the plant manager. The respondent employs two receivers at The Queensway to receive raw materials, primarily to be used in its manufacturing operations, as well as three receivers at Brown's Line who receive material to be used in the packaging process. The receivers at both locations are supervised by the same individual, who is based at The Queensway.

13. All potential new employees are "screened" at The Queensway and then sent to the appropriate supervisor who decides who will be hired. As already noted, all employees have the same conditions of employment. The respondent has a central payroll and personnel function.

14. Employees at both locations are jointly involved in social activities sponsored by the respondent, including an annual Christmas party, bowling league and two company baseball teams.

15. Where an employer carries on business at more than one location within a municipality, the Board's general practice is to describe separate bargaining units for employees at each location. The Board will depart from this general practice if the operations are integrated and the employees share a sufficient community of interest. In assessing when to depart from its general practice, the Board has regard to the considerations set out in the *Usarco Limited* case, [1967] OLRB Rep. Sept. 526, namely:

- (a) community of interest of employees:
 - nature of work performed
 - conditions of employment
 - skills of employees
 - administration
 - geographic circumstances
 - functional coherence and interdependence
- (b) centralization of managerial authority
- (c) economic factors
- (d) source of work.

16. In the instant case, the operations at Brown's Line and The Queensway are clearly integrated. Product manufactured at The Queensway is packaged and stored at Brown's Line. Most of the community of interest criteria enunciated in the *Usarco* case tend to favour grouping employees at Brown's Line and The Queensway into a single bargaining unit. While it is true that most of the employees at the two locations do not perform the same work, that is because they are involved in different aspects of the production of the same final products. The main consideration that mitigates against grouping the employees at the two locations into a single bargaining unit is the fact that the two locations are three miles apart. Notwithstanding this geographic separation, however, there has been ongoing movement of

employees between the two locations. This movement takes the form of employees from Brown's Line going to operate a packing machine at The Queensway, mechanics and quality control employees regularly working at both locations, and employees from one location successfully bidding for jobs at the other location. Particularly given this movement of employees between the two locations we are led to the conclusion that there is a strong community of interest between the employees at The Queensway and Brown's Line, and that this community of interest favours grouping the employees at the two locations into a single bargaining unit.

17. The Board is mindful of the need to ensure that a multi-location bargaining unit not significantly impede employee access to collective bargaining. See: *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330. In this case, the applicant has only organized employees at Brown's Line. However, given the relatively small number of total employees involved, and the strong community of interest among the employees, we do not consider that a broader unit would significantly impede employee access to collective bargaining. See: *Murray C. Bulger and Associates Limited*, [1985] OLRB Rep. March 458.

18. Having regard to the foregoing, the Board is satisfied that the appropriate bargaining unit is one described in terms of all employees of the respondent in Metropolitan Toronto, subject to the appropriate exclusions. Given the total number of employees who would come within such a bargaining unit, and the membership evidence filed by the applicant, it is clear that the applicant's membership evidence relates to fewer than 45 per cent of the employees in the bargaining unit. The application is accordingly dismissed.

0721-85-U Public Service Alliance of Canada, Complainant, v. Forintek Canada Corp. and Jacques Carette, Respondents

Change in Working Conditions - Duty to Bargain in Good Faith - Interference in Trade Unions - Remedies - Unfair Labour Practice - Employer refusing to provide information about or bargain existing or proposed salaries - Whether bad faith bargaining - Whether unilateral implementation of salary adjustments freeze violation - Whether union by-passed in communications with employees - Whether insisting on employee authorization to release salary information unlawful - Whether Board barring individual responsible for violations from participation in negotiations - Whether referring dispute to interest arbitration - Damages awarded for breach of bargaining duty - Employer directed to provide copy of Board decision to each employee

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *F. W. Murray* and *S. O'Flynn*.

APPEARANCES: *Denis J. Power, Aaron Rubinoff, Terry Kearney, Terry Ranger, Raymond Dubois, Peter Garrahan, Mary Mes-Hartree* and *Charlene Hogan* for the complainant; *Patricia J. Wilson, M. L. Phelan, Ann Hayward, K. A. French* and *Jacques Carette* for the respondents.

DECISION OF THE BOARD; April 30, 1986

1. In January 1985, after the complainant trade union ("PSAC") had given the respondent Forintek Canada Corp. ("Forintek") notice of desire to bargain for the renewal of their collective agreement, which was due to expire March 31, 1985, Forintek sought PSAC's consent to the implementation of "salary adjustments" for employees in the bargaining unit it represented. It said its decision to do so was the result of a salary survey which had been conducted by an outside consultant at Forintek's request. While pressing its request for consent, Forintek refused to give PSAC any detailed information with respect to the specific adjustments it proposed to make to the salaries of employees in the bargaining unit. It refused to provide PSAC with a copy of the survey. It refused to disclose or discuss the specific proposed adjustments or the salary survey in collective bargaining. Indeed, it even refused PSAC's request for particulars of the salaries then being paid to employees in the bargaining unit. PSAC said it would not consent to unspecified salary adjustments without further information. In direct communications, Forintek advised employees in the bargaining unit that PSAC's failure to consent stood in the way of their salary adjustments and that PSAC had given no reason for its refusal to consent. Then, on June 12, 1985, and without having received PSAC's consent, Forintek unilaterally increased the salaries of almost all of the employees in the bargaining unit. PSAC complains that Forintek's actions violated sections 15, 64, 66, 67 and 79 of the *Labour Relations Act*.

2. Forintek is a body corporate engaged in research and development in the wood products industry at laboratories in Vancouver, British Columbia, and Ottawa, Ontario. Those laboratories were operated by the Federal Government's Department of Fisheries and the Environment prior to their "privitization" in 1979. On August 17, 1979, PSAC was certified by this Board as exclusive bargaining agent for a unit of employees at Forintek's Ottawa laboratories. PSAC and Forintek were thereafter parties to a series of collective agreements of

which the most recent covered the period April 1, 1984 to March 31, 1985. While employees in the bargaining unit form a "local" of PSAC ("the PSAC local") with its own executive, it is PSAC, and not the local, which holds and exercises bargaining rights with respect to this bargaining unit. In each round of collective bargaining, PSAC has been represented by its own staff representatives, assisted by a bargaining committee of bargaining unit employees. Until mid 1982, Forintek was represented in collective bargaining by a lawyer with expertise in collective bargaining. When Tony French became Forintek's President, he discharged that lawyer and designated Jacques Carette, a member of Forintek's management, as spokesman for Forintek in collective bargaining in that and subsequent years.

3. French testified at length about the various matters with which he had had to deal as Forintek went through the process of being weaned from assured government financing. One of the concomitants of such financing had been adherence to federal government wage restraint requirements. By the spring of 1984, French was concerned that the salaries of Forintek's scientific and technical personnel had fallen below "market" levels. In June 1984 he commissioned the firm of Thorn, Stevenson & Kellogg ("TSK") to conduct a salary survey. They did so, and concluded that salaries in all scientific and technical job categories were below market to varying degrees. They estimated the cost of bringing salaries up to market average at \$500,000 per annum, which represented about 10% of Forintek's payroll. The salary structure envisaged by that proposal was different from the one then employed by Forintek. The actual application of it to individual employees required that each employee be assigned a pay grid and performance rating. In October 1984, French and Carette met with managers of the various Forintek departments to obtain their performance rating of the various employees in their departments. This information was then given to TSK and TSK was asked to show how the sum of \$200,000 per annum might be allocated to salary increases intended to partially implement TSK's market average recommendation. Armed with TSK's detailed answer to that question, French made a presentation to Forintek's Board of Directors on December 6, 1984. He asked that management be authorized to implement a salary adjustment equivalent to \$200,000 per annum, effective January 1, 1985. According to French, Forintek's Board was reluctant to authorize any increase. In the end, it resolved "that management be authorized to implement a salary adjustment equivalent to \$200,000 annual [sic] on January 1, 1985, provided the funds are distributed based on performance at management's discretion."

4. Meetings of managers had already been scheduled for the second week in January 1985. Carette and French decided to use that occasion to acquaint department managers with the Directors' decision and have them make allocations of the funds earmarked for salary adjustments. French and Carette chose not to give the managers copies of the TSK report. Instead, they gave the managers generalized highlights, but not the specific figures which had been generated by the report. Managers were told that at the end of the week each would be given an amount of money for his or her department which he or she would be expected to distribute "based on performance." Carette and French calculated the amount to be allocated to each department by adding up the individual salary adjustments TSK had projected for each of the employees in that department when it had been asked to allocate \$200,000 to the partial implementation of its market average recommendation. The managers, however, were not told of the employee by employee calculations contained in the TSK report.

5. French had hoped to complete the survey process and implement salary adjustments before the commencement of collective bargaining for the renewal of Forintek's collective agreement with PSAC. He regarded these salary adjustments as matters which should not be

the subject of any negotiation with the union, and now testifies that in January 1985 he thought Forintek had the right under its collective agreement to implement any such salary adjustment without the consent of the union. He thought the planned meeting with department managers in January could be completed before the union would turn its attention to collective bargaining. On January 2, 1985, however, PSAC delivered to Forintek a notice to bargain designating its staff representative, Terry Kearney, as the person to be contacted in order to make arrangements for negotiations. Kearney had acted as spokesperson for PSAC in previous negotiations with Forintek.

6. January 18, 1985 was the Friday of the week in which Forintek's department managers met and were given instructions concerning their role in the allocation of the salary adjustments authorized by Forintek's Board of Directors. Carette was anxious to have these adjustments announced at both the Western and the Eastern laboratories on the following Monday. He arranged a luncheon meeting that Friday with Peter Garrahan and Charlene Hogan. Garrahan and Hogan are employed by Forintek in the Ottawa laboratories. They were then President and Vice-President, respectively, of the PSAC local. They were both aware TSK had conducted a salary survey, since both had been interviewed by TSK personnel during the summer of 1984 in connection with that survey. Carette told Garrahan and Hogan that the then completed salary survey showed that a certain number of Forintek employees were being underpaid by two to twenty percent relative to market, Forintek wanted to make salary adjustments to correct inequities revealed by the survey, and its Board of Directors had authorized that \$200,000 be added to the salary budget as a first step in that process. This amount would be split between the Eastern and Western laboratories and further divided among the various departments. The division as between departments would be made by senior management; the manager of each department would have the authority to distribute the allocated increase among individual employees on the basis of "proficiency." Carette said that Ontario labour relations law prevented Forintek from making these adjustments for employees in the bargaining unit without the union's consent after the union had given notice to bargain. He said the purpose of his meeting with them was to obtain the necessary consent. Although they asked, he declined to say what portion of the \$200,000 figure was allocated to the Eastern laboratories. He said the union would not be given any further information with respect to the survey or the proposed adjustments and that the company was not prepared to make the adjustments the subject of collective bargaining. He said "proficiency", the basis on which the allocations were to be made by individual department managers, was not to be confused with "merit", one of the factors addressed by the corporation's existing salary administration policy and by the existing collective agreement between Forintek and PSAC. Garrahan and Hogan did not purport to consent on PSAC's behalf at that point. They had the impression Carette expected them to speak to employees in the bargaining unit. Garrahan told Carette that he had a work assignment which would take him out of the city for the following two weeks, so the issue would not be dealt with until he returned.

7. On Monday, January 21, 1985, Carette delivered the following memorandum to "All Managers":

RE: Salary Adjustments Announcement

At your 1:00 pm meeting you may want to mention about the salary adjustments which will take place today in Vancouver.

Permission has been requested from PSAC for immediate implementation in Ottawa. No response, however, has yet been received. You are encouraged, however, to make the following statement:

“As a result of the TSK study, Forintek has decided to make a salary adjustment effective January 1, 1985. Permission has been asked of PSAC to inform the Eastern Laboratory staff of their individual adjustments based on merit. As of today, permission has still not been given and accordingly no adjustment can take place. We hope to receive PSAC agreement before the end of the budget year since there is no guarantee that the funds will still be available after April 1.”

Any change will be communicated to you as soon as it occurs.

[emphasis added]

Charlene Hogan testified that her manager met that day with employees in the department in which she works. He told the employees about the proposed adjustments, invited their comments on how he might distribute the amount allocated to his department, and read to them the statement which appears in quotation marks in Carette's memo.

8. A meeting of bargaining unit employees had been scheduled by the local's executive for February 5, 1985, to discuss the proposals they wished PSAC to make on their behalf in the negotiations with Forintek for the 1985-86 collective agreement. Forintek's desire to make salary adjustments became a matter of discussion at that meeting. Garrahan spoke against consenting to the adjustments when the amounts to be distributed and the basis of the distribution had not been disclosed. He argued, instead, that the matter of salary adjustments ought to be dealt with in collective bargaining. Some employees agreed with Garrahan. Others regarded the employer's proposal as a gift, and questioned why there should be resistance to it. A motion that "discussion on salary adjustment be referred to negotiations as the first item of business and that this item be resolved before proceeding with any other business" was passed by a narrow margin in a secret ballot vote. The following day, a number of members petitioned for reconsideration of that motion, citing the deadline of March 31, 1985 imposed by management for acceptance of these salary adjustments, a rumour that salary adjustments were non-negotiable items, and concern that, on the wording of the resolution, no further negotiation for 1985 contract would take place if negotiation of salary adjustments was unsuccessful. The petitioned-for meeting was held February 7, 1985. A vote conducted otherwise than by secret ballot reversed the earlier motion by a narrow margin. The discussion which led to this result was so heated that Peter Garrahan and one other member of the executive immediately resigned their offices in the local and two or three other employees purported to resign from membership. Charlene Hogan, who personally favoured consenting to the unspecified increases, became acting President.

9. On February 8th, Carette invited Hogan out to lunch. He told her that he was aware of the result of the previous day's meeting and of the resignation of Garrahan as President of the local. He said that she could either advise him to make the salary adjustments or she could advise PSAC of the decision and ask them to implement the necessary paper work. They discussed salary adjustments again. Hogan expressed concern about the fact that managers would be making salary adjustment decisions without having before them the information contained in the salary survey. Carette replied that the process was part of a training program for managers. Hogan told Carette that the salary adjustment issue had harmed employee morale by dividing employees into two factions. It is Hogan's evidence, which we accept where it differs from that of Carette, that Carette told her he was hoping something like that would happen "to clear the air", as there was a lot of underlying tension and he felt it was best

for this come to the surface in what he described as a sort of catharsis. Hogan expressed doubts about her authority to consent to the proposed salary adjustments, and made it clear she preferred to let PSAC deal with the matter.

10. At a meeting on February 11th, Hogan advised PSAC's Terry Kearney of the salary adjustment proposal and the meetings and resolutions it had engendered. His reaction was that to consent to the adjustments without further information and without making them the subject of collective bargaining would cripple the union's bargaining power, and that so long as PSAC continued as bargaining agent for the employees in the bargaining unit, PSAC's position would be that the salary adjustments should be discussed in negotiations and that its consent to those adjustments would not be given without further information.

11. On February 14th, Carette again pressed Hogan about consent to the salary adjustments. Hogan made it clear that these would have to be discussed with Kearney. A formal collective bargaining meeting was scheduled for the afternoon of February 22nd. Carette suggested that Hogan and Kearney meet with him to discuss salary adjustments prior to that meeting. Hogan suggested that bargaining unit people ought to be present as well, but Carette told her she had two options: he would meet with Hogan and bargaining unit employees or he would meet with Hogan and Kearney. She selected the latter option, and Hogan, Kearney and Carette met for lunch on February 22nd.

12. At the luncheon meeting of February 22nd, Carette told Kearney that Forintek wanted to "implement salary adjustments based on the results of the salary survey", that the company did not have enough money to match market salaries immediately, but that the proposed adjustments would be a "downpayment" toward achieving that result. Kearney made repeated requests for further information about the salary survey and the proposed salary adjustments; Carette refused to give any further details. When Carette brought up the matter of the February 7th vote, Kearney made it clear he did not feel bound by that vote and that Forintek would have to deal with him as PSAC's representative on this issue. Kearney asserted that discussion of the salary adjustments ought to be the first step in the negotiations for the renewal of the collective agreement. Carette responded that salary adjustments would not be any part of those negotiations, and expressed indifference when Kearney told him that the approach he was taking violated the *Labour Relations Act*. The formal negotiating session that afternoon was brief. As spokesperson for PSAC, Kearney presented its proposals. Carette gave an initial reaction and indicated that the company proposals would be forthcoming at a later date. Either then or at some subsequent point, a further bargaining meeting was scheduled for March 9th.

13. On March 8, 1985, Forintek's president, Tony French, called Charlene Hogan to his office. He told her that while it was perhaps not diplomatic or safe to have her there, he wanted to clear the air and establish some communication. He invited her observations about the salary adjustment issue. She explained that discussions on that issue had resulted in a split of bargaining unit employees into two factions of roughly equal numbers. French expressed surprise at this, saying it was his impression that those opposed constituted only a "small vocal minority." They discussed the survey. French was adamant that he wanted the salary adjustments made, saying he felt his employees must be treated fairly. He remarked that he was all for a union as long as employees were treated fairly. Hogan testified that French told her if she ever needed any help, she should go to Jacques Carette, and that the company's lawyers would be able to handle her problems. Hogan was not sure what exactly French meant:

whether the help offered was with respect to by-passing Kearney to obtain the implementation of the salary adjustments or help with Kearney himself or help with respect to other people in the bargaining unit. French's version of this conversation is that his reference to help stemmed from his understanding that Hogan was being harassed by other bargaining unit members because of her personal support for the implementation of the salary adjustments. He said he was only attempting to assure her that she did not have to take abuse, that she could speak to Carette if she did not know what to do about the abuse, that she ought to get legal advice and that if she did not know who to contact for legal advice, she could speak to the company's lawyers who would refer her to someone suitable.

14. Problems with airline schedules prevented Kearney's attending the scheduled March 9th meeting at the appointed time. Company officials were unwilling to meet late that day or the following day, and Kearney was unavailable for the balance of the month. Some bargaining unit employees then went to PSAC and persuaded PSAC officials that a letter under the signature of Pierre Sampson, then PSAC's President, ought to be written to Jean Person, the Chairman of Forintek's Board of Directors, requesting that the salary survey results be made available to the union and that the distribution of catch-up pay be made the subject of full negotiation with the union. Such a letter was sent on March 12th. Forintek's reply came in the form of the following telegram dated March 14, 1985 from Mr. French:

Re. Your letter March 12, 1985 to Jean Perron, Chairman, Forintek Canada Corp.

-----I am replying on behalf of Mr. Perron to advise you that the relationship between the Board and Management of Forintek is as follows:

1. The Board approved an annual budget for 1984-85 and approved SA a salary administration policy in 1983, and confirmed the market average policy December 1984.
2. Management has the mandate to implement salary policy within the approved budget.
3. Mr. Carette has the mandate to represent the company on all matters with the bargaining unit.

Salary policy was announced to staff immediately following our corporate management planning meeting early January. Staff were advised our salary structure is below market average, some job categories being worse than others. A corrective step towards our policy of market average salaries was offered to staff effective January 1, 1985, provided staff accept prior to March 31, 1985. This corrective step is within approved budget for 1984-85.

I very much regret the delay in resolving the issue your representative has created over the implementation of salary policy. The absence or vacation of your representative has created entirely unnecessary delays for meetings with Mr. Carette to resolve problems. Our schedules have been well-known, and at this time of year cannot be changed since they are critical to our revenue development for the coming year.

You could help the process by instructing your representative to make himself available to meet with Mr. Carette at the earliest opportunity. For your information Mr. Carette is available every day during the week of March 25 in Ottawa. The present situation is most unsatisfactory and is unfairly penalizing a group of our employees.

This telegram bears a notation that it is copied to "PSAC Local President" and "PSAC Local Bargaining Unit". A copy of it was posted on the bulletin board at Forintek's Ottawa laboratories.

15. A meeting was arranged for March 26, 1985, at which another PSAC staff

representative, Bob Yaremko, would fill in for Terry Kearney. On March 25th Carette approached Hogan again, this time to ask about a rumour that she was resigning as president of the local, which she denied, and to ask whether it was true that Yaremko was replacing Kearney, to which her answer was that he was doing so only for the one meeting.

16. At the meeting of March 26, 1985, PSAC representatives again questioned Carette about the proposed salary adjustments. They asked why there was a March 31st deadline. Carette told them that March 31st was the company's fiscal year end, that the salary adjustment was part of the 1984-85 budget, that the company's accounting was done on a cost, not accrual, basis and that the matter therefore had to be concluded within the fiscal year. Carette again refused to give the union a copy of the salary survey. The union asked how much of the \$200,000 would be distributed to employees in the bargaining unit and was given a figure of \$122,796.00 per year. Carette refused to give particulars of the proposed distribution, saying only that some employees would get more than others and that some might get nothing. The Union's representatives asked Carette to tell them what salary was being paid to each of the employees in the bargaining unit and what adjustment Forintek proposed to make to each of those salaries. Carette refused, observing that the company had been bargaining with the union for several years without providing detailed salary information. He said the company's concern about providing such information sprang from a survey conducted at some time in the past, in which, he claimed, most employees had asked the company not to divulge salary information. He said the company would release that information only on upon receiving the employees' written requests that it do so. The meeting ended in a stalemate. While the union, through Yaremko, indicated that it would consider its position further, we are satisfied from the evidence that no one on behalf of the union made any suggestion that Carette could expect to hear from them by March 31st, the deadline by which Carette still insisted the union's consent to salary adjustments had to be received.

17. On Friday, March 28th, the secretary in Charlene Hogan's department announced to those present that she and other secretaries had been told to advise their groups that salary adjustment cheques had come in and would be on Jacques Carette's desk until Sunday night waiting for PSAC approval. Later that afternoon, a copy of the following telegram to PSAC was posted on the notice board at Forintek, where it could be and was seen by bargaining unit employees:

Mr R Yaremko

Following our last meeting of March 26, 1985, PSAC were suppose [sic] to inform Forintek before the end of this week of the position taken by the union regarding the acceptance of the salary adjustments.

In spite of my efforts to reach you and the Local president by phone, we still do not have an answer.

In order to provide all our staff with fair treatment and in view of the strong financial implications if the payments are not made before March 31, you can still reach me at 824-7731 during the weekend to settle this matter.

Jacques Carette
Director, Marketing + Admin
Forintek Ott
cc Notice Board at Forintek PSAC Ott

As we have already observed, the evidence does not support the statement contained in the first paragraph of this telegram. The “efforts” referred to in the second paragraph in each case consisted of a single telephone call placed that afternoon with the result, in the case of Mr. Yaremko, that Carette was told Yaremko was unavailable. In the ordinary course, this telegram did not come to the attention of Yaremko until the following Monday, April 1, 1985.

18. Following the March 31st deadline Forintek had identified as critical to the implementation of salary adjustments, there was no further discussion of or communication about salary adjustments until the next scheduled collective bargaining meeting on April 22, 1985. The union witnesses who attended that meeting say Carette began the meeting by announcing that the salary adjustment monies were still available because the company’s books for the fiscal year ended March 31st had not yet been closed. He placed on the table a large envelope, which he said contained cheques representing salary adjustments for bargaining unit employees for the period January 1 to March 31, 1985. He said these could still be distributed if the union gave its consent by the following day. One of the union representatives, Terry Ranger, again asked for the individual salary information, and advised Carette that the union had collected written authorizations from 70 of the 77 employees in the bargaining unit. Carette replied that he would deal with the matter only upon receiving those written authorizations. Terry Kearney, the union’s chief spokesman, took the position that Carette’s presentation of the cheques in this manner was deliberately intimidating and rendered meaningful collective bargaining impossible. He announced that the union would apply for the assistance of a conciliation officer, and the meeting ended.

19. Forintek’s President, Tony French, testified that he had discussed bargaining strategy with Carette before the April 22nd meeting and they had specifically agreed that Carette was to take the cheques to the meeting and put them on the table in order to make it very clear that money still existed for the salary adjustments management wanted to make. It was Carette’s evidence, however, that he had no plan to put the cheques on the table when he took the envelope of cheques with him to the April 22nd meeting, and only did so as a way of answering a question by Kearney about whether there was money available for salary adjustments. We find French’s evidence on this point more credible than Carette’s. Carette’s loss of credibility on this point has played a part in our rejection of his evidence in other areas where it conflicted with that of other witnesses.

20. On April 23, 1985, French caused copies of the following memorandum to be delivered by hand to bargaining unit employees:

RE: Union Negotiations

At a meeting on April 22, 1984 [sic] with the Public Service Alliance of Canada, your bargaining agent, the corporation was informed that it was the intention of the bargaining agent to petition the Minister of Labor to appoint a Conciliation Officer.

I sincerely regret that it was not possible to arrive at an early and amicable application of our salary administration policy. In my view it is important that all staff affected by this issue clearly understand the facts.

In April 1983, the Board of Directors adopted a Salary Administration Policy to ensure that Forintek’s salary administration program offers equitable and competitive salary rates for all employees. This Policy is very well-known to all employees.

Last December, the Board strengthened the Policy by stipulating that salaries at Forintek shall be maintained at least at market average for similar research laboratories in industry and government.

Various compensation surveys that we have made indicate that our actual salaries are somewhat below market. In recognition of this fact a special budget was approved by the Board last December to implement a catch up program at the earliest opportunity within our financial capacity.

Before we could inform you of your adjusted salary effective January 1st, PSAC served notice to bargain. The law in Ontario prohibits the employer from making any change to compensation while the bargaining process is underway. We were therefore required by law to obtain permission from PSAC to implement the January 1st salary adjustments. We have made attempts at various meetings to secure this permission; *to date our requests have been repeatedly refused.*

A last attempt was made yesterday to obtain permission to release the cheques for the period January 1 to March 31. Acceptance would have automatically implemented the adjustment on a permanent basis. *This permission was again refused and no reasons were given.*

We are an organization that receives a majority of its revenues from governments and contracts. Once the year end accounts are closed, it becomes impossible to capture revenues resulting from cost increases in a prior year. In a final attempt to provide our staff with the salary catch up, we had arranged with our clients and auditors to delay the year-end cut off date. This made possible the cheque offer of yesterday.

You are no doubt aware that we have already implemented our salary policy outside the bargaining unit. Adjustments have been made effective January 1st and April 1st.

I am profoundly disturbed by PSAC response given yesterday to proceed directly to conciliation, without any consideration of the corporation's response to the negotiation requests. This will cause a lengthy delay in the application of our compensation program.

I have instructed Jacques Carette and Jim Dangerfield to be available to participate in meeting's [sic] requested by PSAC to resolve this issue. We want to do everything we can to resolve this most unsatisfactory situation as quickly as possible.

[emphasis original]

21. There were no further meetings of any kind between Forintek and PSAC until June 10, 1985, when union and management representatives met at the request and under the auspices of a Conciliation Officer who had been appointed on the application of the union. Neither party made any fresh proposal or representation directly to the other during the course of this meeting, either before or after their separate meetings with the Conciliation Officer, nor was there any communication to PSAC that the salary adjustments were still available. At the conclusion of that meeting, therefore, collective bargaining negotiations and discussions of the proposed salary adjustments were in the same state as they had been at the conclusion of the April meeting. In the meantime, Ms. Hogan had resigned as acting President of the local and Raymond Dubois had been elected President.

22. On the morning of June 11, 1985, posters were put on the bulletin boards at Forintek's Ottawa labs, giving employees notice of a union meeting to be held at noon the following day, June 12th, to discuss what had taken place at the conciliation meeting on June 10th. In the afternoon of June 11th, Carette asked Raymond Dubois to meet with him. By

this time, members of the local's executive had been cautioned by PSAC that they should not meet on a one-to-one basis with members of Forintek's management, so other employee members of the bargaining committee went with Dubois when he answered Carette's summons. Carette told the employees that he thought the conciliation officer might not have made the company's position clear at the meeting of June 10th. He claimed to have heard conflicting rumours about what the company's position was. He told them the company wanted to give employees the still unparticularized salary adjustments for which it had been seeking union consent, together with an economic increase of 4% of adjusted salaries. He also said the company felt that their union was trying to "negotiate individual salaries" and that the company would not engage in negotiation of individual salaries. Having heard Carette out, the employees resisted the temptation to respond and told Carette that they would advise their bargaining agent of the offers and statements he had made. The following day, prior to their scheduled meeting with their bargaining agent, each of the employees was handed the following memorandum dated June 12, 1985, together with the notice and cheque referred to in the second paragraph of the memorandum:

TO: OTTAWA EMPLOYEES IN THE BARGAINING UNIT

FR: K. A. FRENCH

I have reached the limit of my patience. It is clear that the Corporation's desire to implement our market average salary policy that came into effect January 1, 1985 is causing nothing but confusion and mistrust.

I am at a loss to understand why this has been a problem. In order to clear the air, I am enclosing a notice of your salary as of January 1, 1985 and a cheque to cover your salary adjustment for the period January 1 to March 31. The cheque amount is net of withholdings for income tax, Canada Pension Plan and Company pension plan. The money for the period April 1 to date will be included in your pay cheque on June 28, 1985.

In my memo of April 23, I indicated that it is impossible for Forintek to capture revenues resulting from cost increases in a prior year. The lengthy delays have created a budget risk for this year which I believe the company must take to remove the confusion that has been created.

Jacques Carette and Jim Dangerfield are available to continue discussions on the issues presented by your executive for the 1985-86 contract year.

French says he decided to implement the salary adjustments and distribute the cheques because, as his covering memorandum indicates, he had reached the limit of his patience. He felt negotiations were being dragged out and that the company was being prevented from presenting proposals it claims to have had available at the April 22nd and June 10th meetings. He says he then understood that the union was insisting on "negotiating individual salaries", something he considered inconsistent with his understanding of collective bargaining. When he had attempted some days earlier to have a conversation with Dubois in his capacity as the newly elected president of the local, Dubois had informed him of PSAC's direction that there be no such conversation in the absence of a PSAC representative. French says all this gave him concern that the company's "traditional lines of communication" with its employees had been cut. He says this concern about the loss of lines of communication was one of the reasons he decided to distribute the memo and cheques. He felt he had an "extremely bad morale problem", that the situation was out of control, and that "something precipitous had to be done." He distributed the memorandum and cheques despite having received legal advice that to do so might constitute a breach of the *Labour Relations Act*.

23. It has been French's practice to meet with employees once a year immediately after the corporation's formal annual meeting. In that tradition, Mr. French met with employees on June 22nd. That meeting differed from previous such meetings in three respects: a luncheon was provided, a "President's Award" for outstanding performance during the previous year was presented to an employee and, of significance here, French devoted a portion of his one hour speech to the subject of salary adjustments and collective bargaining. He spoke of the employees' vote to accept the salary adjustments, the difficulties he had had in implementing them and his inability to understand the position the union had taken on that subject. He spoke of what he described as the union's desire to "negotiate individual salaries." He claimed that the Conciliation Officer had expressed surprise at the union's request for salary information and had described it as "not common." He said the company's lawyers had also said it was unusual. Employee members of the bargaining committee and local executive testified that there was a clear implication in French's remarks on that occasion that the union was not acting in the best interests of Forintek's employees but, rather, from some ulterior motive.

24. The respondent's major defense of the complainant's charges is that, despite all its contrary representations to employees and the union, these salary adjustments were "merit" increases which the company had the right to grant without the union's consent under the provisions of the expired collective agreement.

25. The parties' last collective agreement covered the period April 1, 1984 to March 31, 1985. The two previous agreements covered the periods February 19, 1983 to March 31, 1984 and February 19, 1982 to February 19, 1983. Article 27 of each of those three agreements reads:

ARTICLE 27 - EMPLOYEE CLASSIFICATIONS AND SALARY RANGES

27.01 The classifications of all employees are contained in Appendix "B" hereto and the salary range for each classification is set forth in Appendix "C" hereto.

Actual pay scales are not expressly addressed in any other article of the main body of any of these agreements. The "management's rights" article in each agreement reads:

ARTICLE 3 - MANAGEMENT'S RIGHTS AND RULES

3.01 The union acknowledges that the Employer has the exclusive right and power to manage its operations and as incidental thereto to maintain order and efficiency, to classify and direct its working force, to hire, promote, transfer, demote and lay off employees and to discipline, suspend or discharge employees for just cause.

Appendix "B" to each agreement lists the names of bargaining unit employees. Beside each name is an alphanumeric classification (reminiscent, not surprisingly, of classifications used in the federal public service) and a numeric salary level code. Appendix "C" to each agreement assigns a salary range to each numeric salary level. The following note appears at the bottom of Appendix "C" to the most recently expired agreement:

Note: Range progression shall be equal to 1/8 of the difference between the minimum and maximum pay level for each salary range.

Each agreement has an Appendix entitled "Salary Adjustments". In the most recently expired collective agreement, that Appendix (Appendix "E") reads as follows:

SALARY ADJUSTMENTS

The Employer proposes a salary increase for employees to take effect April 1, 1984 on the basis of a general and merit adjustment.

Each employee will be evaluated by the Employer in accordance with its Salary Administration Policy and Merit System.

The Employer proposes the following salary adjustments based on each employee salary at March 31, 1984.

1. On April 1, 1984 a general economic increase of 5% will be applied to all salary ranges and to each employee's salary.
2. In addition, on April 1, 1984:
 - For those employees who have demonstrated a continuing effort at improving performance and productivity and who are still below the mid point of their salary range, a range progression increase.
 - For those employees who have demonstrated significant improvement to performance and productivity or exceptional contributions to the Employer's affairs, a merit increase of no less than 3%.

Each meritorious employee will be advised of his performance by his manager.

The corresponding appendices to the two earlier agreements are somewhat different. In the Salary Adjustments Appendix to the 1983-84 agreement, the general economic increase was 4.54%, there was an undertaking that the total amount of salary adjustments would represent an increase of 6% and the reference to range progression increases was somewhat different. The Salary Adjustments Appendix to the 1982-83 agreement does not refer to the "Salary Administration Policy And Merit System", which the evidence indicates was adopted in 1983. Instead, it refers to a merit system in which units of merit are assigned in accordance with a performance rating. The 1982-83 Appendix provides for a general increase of 9% together with an increase of 1% for each unit of merit. By contrast with the 1983-84 and 1984-85 agreements, when the 1982-83 agreement was negotiated, there was no legislated government wage restraint program in effect.

25. The Salary Administration Policy And Merit System referred to in Appendix "E" to the 1984-85 agreement (and in French's written communications with employees) provides, in part:

The salary year extends from April 1 to March 31 of the subsequent year.

The Salary Administration program has three parts;

1) Economic Adjustment

An economic adjustment to the salary schedule will normally apply to all salary ranges within the schedule. The President and Chief Executive Officer, in consultation with management, will establish the economic adjustment. Normally, the adjustment will be effective at the start of the salary year.

2) Range Progression

Range progression permits an employee to reach the mid point of the salary level after four years, contingent upon fully satisfactory performance appraisals. This is the estimated period of time necessary to learn all aspects of a job and perform the duties in a fully satisfactory manner.

The Department Manager is responsible for identifying eligible employees. The awarding or withholding of a range progression increase must be approved by the Division Director.

3) Merit

The merit increase recognizes significant improvements to performance and productivity or exceptional contributions to the Corporation's affairs.

The Department Manager is responsible for identifying eligible employees. The awarding of a merit increase must be approved by the Division Director, in consultation with the President.

All merit is subject to the limitations of the budget available for this purpose, but normally, it is no less than three percent of an employee's salary to preserve the motivational intent.

It is the responsibility of the Department Manager, in consultation with the Division Director, to regularly establish goals, objectives and expectations of employee performance, consistent with the department's program and the Corporation's affairs. Communication of performance assessment to the employee on a regular basis is fundamental to motivation and this salary administration program.

Written performance appraisals are required to support range progression and merit increases. A written performance appraisal must be prepared at least annually for each employee. All written performance appraisals must be discussed between the employee and the supervisor concerned. The appraisal must be approved by the Division Director and copies sent to the employee and to Personnel for the employee's file.

[emphasis added]

26. Terry Ranger participated on the union's behalf in the negotiation of the 1984-85 agreement and its two predecessors. He testified that during negotiations leading to the 1983-84 agreement, and again during negotiations leading to the 1984-85 agreement, Carette calculated the cost of Forintek's salary adjustment proposal and revealed that cost to the union before the proposal was adopted and agreed to as part of the collective agreement. Thus, PSAC union knew the total amount Forintek proposed to devote to range progression and merit increases even though it might not have known which employees would receive such increases. Although the total cost of salary adjustments as a percentage of payroll is not specified in the 1984-85 agreement as it was in the 1983-84 agreement, Ranger emphasized that the limitations of Forintek's budget for merit and range progression increases were revealed by Carette in the 1984 negotiations before the 1984-85 agreement was finalized. He produced a typewritten sheet which Carette gave him on April 2, 1984, setting out monthly figures for total payroll, economic increase, range progression, and merit. Ranger testified that in previous years all range and merit increases were implemented at the same time as the economic increase negotiated and provided for in the Salary Adjustments Appendix to the collective agreement. Forintek's witnesses were able to identify only two employees who had received an increase of any sort otherwise than on the date general economic increases were implemented. One instance had arisen during the term of the 1983-84 agreement, the other occurred during the

term of the 1984-85 agreement. During the meetings referred to earlier and again in his testimony, Carette acknowledged that there had never before been non-“economic” salary adjustments of this magnitude. While he sought to describe these adjustments as merit increases, he acknowledged having told the union that they were not to be confused with merit increases. His explanation for this was that the confusion he wished to avoid was any confusion that these increases were something which could be the subject of collective bargaining. As for their being merit increases implemented in accordance with the Salary Administration Policy recited earlier, Carette acknowledged that none of them had been made on the basis of a written performance appraisal handled in the manner contemplated by the words emphasized in our quotation of the policy in paragraph 25 of this decision. Indeed, Forintek’s counsel acknowledged during argument that in dealing with salary adjustments in question here, Forintek had not followed the procedure prescribed for merit increases in its Salary Administration Policy.

27. The complainant trade union argues that the respondent employer’s actions together constitute an attempt to effect an end run on the union by by-passing it and dealing directly with bargaining unit employees on matters about which it is obliged to deal with the union as the exclusive bargaining agent of those employees, contrary to sections 15 and 67(1) of the *Labour Relations Act*. It submits that the employer’s refusals to provide information about existing salaries and proposed salary adjustments violated section 15 of the *Labour Relations Act*, that its unilateral adjustment of salaries in June 1985 violated sections 15 and 79 of the Act and that its communications with bargaining unit employees were calculated to undermine the trade union’s relationship with bargaining unit employees and so violated sections 15 and 64 of the Act.

28. The respondent employer argues that its officials acted in a reasonable belief that it was entitled to make the salary adjustments in question under the expired collective agreement, and so could not have had the “anti-union animus” it says is necessary for a finding that it breached any of sections 15, 64 or 67 of the Act even if their belief were wrong. Furthermore, it submits that their belief was correct and that the implementation of the salary adjustments in question was not a violation of section 79 because that action was permitted by the terms of the expired collective agreement. It says there is no evidence that it was unwilling to enter into a collective agreement with the complainant, nor of any motive it could have for such unwillingness. As for its refusals to provide detailed salary information, it relies on its past practice of non-disclosure and on the survey on which that practice was based, submits that the information sought was unnecessary, and argues that the union “has a lot to answer for” for not clearing the air by providing it with each employee’s written authorization to release the requested information. It submits that its communications with employees fall within the bounds of the freedom of expression specifically preserved by section 64 of the Act, and did not constitute direct bargaining with employees.

29. The *Labour Relations Act* limits the circumstances in which employers and employees can use the economic weapons of strike and lockout, the disruptive effects of which so often extend beyond the immediate parties. In particular, the Act prohibits employees from engaging in a strike in order to force their employer to recognize a trade union as their bargaining agent. Instead, absent voluntary recognition by the employer, the limited circumstances in which employees to which the Act applies may lawfully resort to collective economic action can arise only after a trade union has demonstrated to this Board that it represents a majority of employees in a bargaining unit which the Board finds appropriate

having regard to considerations which include protection of the employer from the adverse consequences of fragmented bargaining with respect to a multiplicity of bargaining units. If the trade union demonstrates majority support, it becomes the exclusive bargaining agent of all employees in the bargaining unit, with the statutory right to bargain collectively on their behalf and a corresponding statutory obligation (customarily referred to as the duty of fair representation) not to act in a manner which is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit. For its part, the employer is then obliged by the Act to recognize the trade union's Board certified status as exclusive bargaining agent, and both employer and trade union must bargain with a view to entering into a collective agreement. Union and employer may use the strike or lockout weapon to achieve bargaining goals after exhausting the conciliation process mandated by the Act, but neither party is permitted to use its economic power to force a change in the scope of the union's bargaining rights and the employer's corresponding obligation to recognize the union as exclusive bargaining agent for employees in the unit to which those bargaining rights attach: *CCH Canadian Ltd.* [1974] OLRB Rep. June 375; *Carpenters Employer Bargaining Agency* [1978] OLRB Rep. Aug. 776; [1978]2 Can. LRBR 501; *Cybermedix Ltd.* [1981] OLRB Rep. Jan. 13. Section 15 and other provisions of the Act reinforce the fundamental requirement that an employer recognize the representation rights of its employees' exclusive bargaining agent.

30. The *Labour Relations Act* provides that:

14. Following certification, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they *shall bargain in good faith and make every reasonable effort to make a collective agreement.*

53.-(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

• • •

54. Sections 15 to 34 apply to the bargaining that follows the giving of a notice under section 53.

[emphasis added]

The purposes of section 15 (then section 14) were explained by the Board in *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49:

14. ...a very important function of section 14 is that of reinforcing an employer's obligation to recognize a trade union lawfully selected by employees as their bargaining agent. Certainly the freedom to join a trade union of one's choice declared in section 3 of the legislation would be but an edict "writ on water" if an employer could enter into negotiations with no intention of ever signing a collective agreement. But we believe the duty to meet and make every reasonable effort to make a collective agreement has an even more important function in a modern society that for the most part accepts that trade unions have legitimate and important roles to play. That is to say that the duty assumes that when two parties are obligated to meet each other periodically and rationally discuss their mutual problems in a way that satisfies the phrase "make every reasonable effort", they are likely to arrive at a better understanding of

each other's concerns thereby enhancing the potential for a resolution of their differences without recourse to economic sanctions - the impact of which is never confined to the immediate parties of an industrial dispute. At the very least rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the "true" differences between them...

15. ...the duty described in section 14 has at least two principle functions. The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.

At the first bargaining meeting following its certification, the trade union complainant in *DeVilbiss* had asked the employer for particulars of the existing wage rates and job classifications of employees in the bargaining unit, and the employer had refused to do so. The Board found that this refusal was inconsistent with the duty to make every reasonable effort to make a collective agreement, observing that:

16. ...Particularly in "first agreement" situations, it is little wonder that a complainant would have an incomplete monetary demand until it fully appreciated the current rate of wages paid by a respondent and the detailed nature of its job structure. Rational and informed discussion cannot easily take place until this information is provided to a trade union and thus this aspect of the duty supports its production. As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. It is patently silly to have a trade union "in the dark" with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit. Moreover, a trade union has a duty to all of the employees in the bargaining unit and thus has to be concerned, in a large measure, with equality of treatment... Further, in the facts at hand, we have no doubt, when the totality of the respondent's conduct is considered, that the "bad faith" aspect of the duty also effectively characterizes the respondent's failure in this regard. But, as noted above, a finding of bad faith is not a prerequisite to a finding that section 14 has been violated.

Since *DeVilbiss*, the Board has repeatedly observed that section 15 of the Act requires that employers comply with a request by its employees' trade union bargaining agent for particulars of their existing terms and conditions of employment: *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (jud. rev. denied, in *Re Tandy Electronics Ltd.*, and *United Steelworkers of America et al.* (1980), 30 D.R. (2d) 29, 80 CLLC 14,017 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused March 10, 1980); *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, [1983] OLRB Rep. July 1138, 83 CLLC 16,055; *The Windsor Star*, [1983] OLRB Rep. Dec. 2147; and *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] OLRB Rep. May 705. While difficulties with requests for particulars of existing terms and conditions of employment most frequently arise during negotiation of a first collective agreement, the obligation to comply with such requests exists equally during bargaining for the renewal of a collective agreement: *Globe Spring & Cushion Co. Ltd.*, *supra*; *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, *supra*.

31. In *DeVilbiss* and subsequent decisions, this Board has observed that the process of rational discussion contemplated by section 15 of the Act necessarily requires that the parties disclose to one another certain kinds of relevant information: see, for example, *Canadian Industries Limited*, [1976] OLRB Rep. May 199, 76 CLLC 16,014; *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep.

Feb. 261; and, *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411, 83 CLLC 16,066. In *Westinghouse Canada Limited*, *supra*, the Board asked rhetorically (at paragraph 39):

... Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, *can there be any doubt that the section 14 [now 15] duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit.* Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

[emphasis added]

32. In this case, by the time the parties reached the bargaining table the respondent employer had announced its decision to make unspecified increases in employee salaries at a future date, with retroactive and, impliedly, prospective effect. Whether or not implementation of the decision was said to be contingent on some occurrence (as here, where it was said to be contingent on union consent), regardless whether the decision was made or announced before or after notice to bargain was given and apart altogether from any duty which then arose to negotiate about the then unimplemented increases, once the section 15 duty came into play the employer was under an obligation to answer the trade union's request for particulars of the salary adjustments it had determined to make, if only because the employer had adopted the perspective that the adjusted salaries would be the starting point for negotiation of monetary issues and it was patently silly, as the Board observed in *DeVilbiss*, to keep the union in the dark about what that starting point was.

33. A belief that some number of bargaining unit employees did not wish the requested information disclosed to the union is no answer to a complaint that the failure to disclose it violates section 15 of the Act, any more than a belief that some number of employees did not wish the union to represent them would justify a refusal to bargain with a union which is entitled by law to act as exclusive bargaining agent for a bargaining unit which included those employees. The union's right to and need for the requested information were and are concomitants of the rights and obligations which flow from its status as exclusive bargaining agent, a status which continues until its bargaining rights are abandoned by the trade union or terminated by vote of a majority of employees in the bargaining unit. Although the union has not made a separate complaint about the past survey on which the employer relied during bargaining when it refused to provide requested information, we are bound to observe that it is quite inconsistent with recognition of a trade union as exclusive bargaining agent of all employees in a bargaining unit for the employer to have asked those employees individually (or collectively) whether they approved of the employer's giving information about their salaries to their bargaining agent. The respondent's demand for individual written authorizations was equally inconsistent with its obligation to recognize the union as exclusive bargaining agent, and neither the union's delay in providing nor its attempts to obtain such authorizations can in any way excuse the respondents' conduct. The fact that Forintek had

refused to provide requested particulars of existing terms and conditions of employment during the bargaining which led to previous collective agreements without its refusal then becoming the subject matter of an unfair labour practice complaint is no answer to this complaint that its refusal to do so during these negotiations violated section 15 of the Act.

34. Thus, the respondent employer violated section 15 of the Act when it refused to provide the union with requested particulars of the existing salary and proposed salary adjustment of each employee in the bargaining unit.

35. The respondent also violated section 15 by refusing to treat the then unimplemented salary adjustments as something to be discussed in collective bargaining. Whatever may be the outer limits of the duty to bargain, there can be no doubt that the amount of wages or salary to be paid to bargaining unit employees during the proposed term of a first or renewal collective agreement is a subject which must be addressed in bargaining if, as is inevitable, either party raises it. Here the employer says the adjustments could have been implemented without the union's consent during the unexpired term of the last collective agreement without violating any provision of that agreement. The fact is that it sought and was refused the union's consent to the adjustments and did not implement them before the last agreement expired. Even if the agreement permitted unilateral salary adjustments and Forintek had simply announced an unconditional plan to implement such adjustments before that agreement expired, the post-expiry prospective effects of those planned adjustments would still have been a proper subject for collective bargaining and one which the union was entitled from the outset to address.

36. The appropriate distribution of the total wage package is as relevant a subject for collective bargaining as its size. Discussions of the appropriate distribution of wages will address the factors which the parties feel determine or ought to determine the wage each employee receives, and this may well require discussion of the salaries of particular employees or groups of employees. There is certainly nothing unusual about a trade union's seeking a collective agreement which spells out the objective criteria by which each employee's wage is to be determined, leaving no scope for unreviewable management discretion, and by that means effectively determining each and every employee's wage. Indeed, subject to the duty of fair representation (which the union owes to employees, not to their employer), there is nothing legally objectionable about a trade union bargaining agent's seeking an agreement which spells out to the last cent what each individual employee is to receive. If it was their belief that negotiation of individual salaries is inconsistent with collective bargaining, then French and Carette were simply wrong. In that regard, we observe that neither offered any basis for this belief; apart from their involvement in Forintek's collective bargaining with PSAC, neither had any training or experience of collective bargaining in this province which would warrant confidence in self-counsel. Neither seems to have had any concern about the correctness of his understanding of the law, even after Kearney told Carette that his behaviour violated specified sections of the *Labour Relations Act*. It is axiomatic, of course, that ignorance of the law cannot excuse its breach.

37. Apart from the question whether it violated section 79 of the Act by doing so, a matter with which we deal later, the respondent employer's unilateral implementation of salary adjustments on June 12, 1985 violated section 15 of the Act, for reasons which were explained in the Board's decision in *DeVilbiss (Canada) Limited, supra*, at paragraph 17:

of employment while it was in the midst of collective negotiations with the complainant. From the outset, as evidenced by its memoranda of September 19th and 22nd, the respondent began to emphasize its “right” to alter the terms and conditions of employment after the expiration of the fourteen day period provided for in section 70 [now 79]. We put the word “right” in quotation marks because section 70 must be integrated with the policy and wording of section 14 [now 15] and section 7. The trade union is the exclusive bargaining agent for the employees in the bargaining unit. And thus the employer cannot, as a general rule, deal directly with his employees with respect to their terms and conditions of employment. (See *Le Syndicat Catholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paquet Ltee* (1959) 18 DLR (2d) 346 (SCC); *J.I. Case Co. v. NLRB* (1944) 321 U.S. 332.) He must respond to such issues through the officially designated bargaining agent. When an employer, while negotiating with a trade union, implements new conditions of employment that have not even been first proposed to the trade union, the inference logically arises that the tactic is designed to undermine the status of the trade union - amounting to a suggestion that beneficial terms and conditions of employment do not require the presence of the bargaining agent. (See *NLRB v. Reed & Prince Mfg. Co.* 205 F. 2d 131 (1st Cir.); Cert. denied (1953) 346, U.S. 887; *NLRB v. Katz*, (1962), 369 U.S. 736.) Professor Cox ([*The Duty to Bargain in Good Faith* (1958) 71 Harv. L. Rev. 1401] at (1423) commented on the problem in the following manner:

(2) Unilateral action yields to much the same analysis. When taken during negotiations or upon subjects on which the union wishes to bargain it weakens the union by showing the employees that it is useless to try to negotiate. If the employer unilaterally raises wages or makes some other concession, his conduct effectively tells the employees that without collective bargaining they can secure advantages as great, or possibly greater than, those the union can secure. Unilateral changes made while the employees' representative is seeking to bargain also interfere with the normal course of negotiations by weakening the union's bargaining position. Consequently, proof that an employer changed wage rates or other terms of employment in the midst of contract negotiations ordinarily gives rise to the inference that he had no intention of coming to an agreement; the factual inference can be negated by showing that there is a need for immediate action or by proving that the negotiations had reached an impasse.

In other words, if section 70 was read and applied in a literal fashion, an employer could use the freedom thus found to avoid his statutory duty to recognize a trade union and bargain in good faith. Therefore, it is our opinion that section 70 is designed to provide the employer with freedom to alter the terms and conditions of employment when negotiations have reached an impasse (although even then, while possessing a somewhat different content, the bargaining duty applies (see *New Method Laundry & Dry Cleaners* (1957) 57 CLLC 18,059) or where there is a *bona fide* business reason for such immediate action)....

Although Forintek had announced in January that it would make changes in salaries, it had never told the union what the changes were or treated them as a matter for discussion, so it cannot be said that the changes implemented in June had first been “proposed” to the union in the sense intended by the Board in the quoted passage. Forintek cannot rely on the impasse at which negotiations had arrived in June to justify its unilateral action, since that impasse was entirely the result of its own unlawful conduct in refusing to reveal or discuss particulars of its proposed action. We cannot find in the contemporaneous and subsequent explanations French gave for his taking unilateral action at that time any otherwise *bona fide* business reason for unilateral action which is unrelated to the consequences of Forintek's prior unlawful conduct.

38. Subsection 79(1) of the Act provides:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right,

privilege or duty of the employer, the trade union or the employees, and no trade union shall except with the consent of the employer, alter any term or condition of employment, or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

The purpose of the “statutory freeze” imposed by section 79 is to maintain the prior pattern of the employment relationship in its entirety while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. Reference to the purpose of section 79 is important because the application of its language to particular fact situations is not always a simple task. The *status quo* of an employment relationship may include the recognized prospect of change. The interpretive problem this creates is most easily illustrated by the apparent dilemma of an employer considering whether he should or should not implement during the freeze a wage increase which he would otherwise have given because he had made a promise to do so before the events which triggered the freeze: whatever he does will alter either the wage rate or a pre-existing right to a wage increase. Another less immediately obvious tension in the statutory language is that created by the simultaneous preservation of pre-existing wage rates and other terms and conditions of employment on the one hand and pre-existing employer rights and privileges on the other. In a first contract situation, those pre-existing employer rights and privileges might be said to include the right or privilege to make unilateral changes in pre-existing wage rates and other terms and conditions of employment, but if the section were interpreted as preserving all such management rights it would be rendered meaningless: see *Sunnycrest Nursing Home*, *supra*, at paragraph 44; and, *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609 at paragraph 21.

39. These and other difficulties with the literal meaning of the words of the section have led the Board to adopt a purposive “business as before” interpretation of section 79, which requires that an employer continue to run its operation according to the pattern established before the circumstances giving rise to the freeze occurred: *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859. The elements of the prior pattern are ascertained from the perspective of employees - a pre-freeze decision to alter wage rates or working conditions may not be implemented unilaterally during the freeze period unless the decision was also communicated to employees before the events which triggered the freeze: *Carleton University*, [1978] OLRB Rep. Feb. 184; *LePatro de’Ottawa*, [1983] OLRB Rep. Feb. 244. Indeed, the importance of the employees’ perspective to a purposive analysis of section 79 underlies the recent evolution of the “business as usual” approach into the “reasonable expectations of employees” test applied in *Simpsons Limited*, [1985] OLRB Rep. April 594.

40. It is important to observe that the purpose of the freeze imposed by subsection 79(1) is the same in renewal bargaining situations as it is when first contract negotiations begin: maintenance of prior pattern of the employment relationship in its entirety. While far more of that pattern is likely to be found defined in the parties' expired collective agreement than would ordinarily be found in the individual employment contracts in place when first contract negotiations commence, as with those antecedent individual contracts the terms of that expired collective agreement might not exhaustively define the rights, privileges and duties which are frozen by subsection 79(1): see, for example, *The Hydro Electric Power Commission of the City of Mississauga*, [1977] OLRB Rep. Dec. 821; *A.N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479; *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; and *Ontario Hydro*, [1983] OLRB Rep. Sept. 1536 at paragraph 3. In particular, while subsection 79 may preserve a right specifically reserved to management by the express terms of a collective agreement, and so not prohibit the changes which result from the exercise of that right during the period of the freeze, the same cannot be said for the implied or residual management "rights" whose existence would be established at arbitration under the collective agreement by demonstrating that no provision of the collective agreement prohibited their exercise: see *Molson's Brewery (Ontario) Ltd.*, [1977] OLRB Rep. Aug. 526 at paragraph 10. Accordingly, the assertion that a wage increase was not prohibited by the collective agreement before it expired, even if true, is not a sufficient answer to a complaint that a post-expiry increase violates subsection 79(1).

41. The union gave timely notice to bargain in January 1985, and its collective agreement with Forintek expired on March 31, 1985. The "freeze" imposed by subsection 79(1) began April 1, 1985. Prior to that date, Forintek announced that it would implement retroactive salary adjustments *if* by March 31st it received the union's consent to do so. The salary adjustments implemented on June 13th fell within the period covered by subsection 79(1). They were not adjustments to which the union had consented, either by March 31st or at all, and so it cannot be said that they were adjustments about which Forintek had made its commitment known before the freeze period began. The expired collective agreement gave the respondent no express right to make salary adjustments otherwise than on April 1, 1984, and even that express right could only be exercised in accordance with the procedures outlined in its Appendix "E" and the Salary Administration Policy and Merit System referred to in it. The salary adjustments in question were not made on April 1, 1984, nor in accordance with the prescribed policy and system. The two instances of mid-contract salary increases offered in evidence by the respondent do not establish a pattern to which the granting of increases to nearly all bargaining unit employees in amounts totalling over \$122,000.00 can be said to conform. Employees in the bargaining unit could not have had any reasonable expectation of unilateral salary increases prior to April 1, 1985, particularly when the respondent had repeatedly said that such increases could not be implemented without the union's consent. Accordingly, we find that the implementation of salary adjustments on June 12, 1985, also violated subsection 79(1). It is unnecessary for us to determine whether unilateral implementation of these adjustments before the expiry of the collective agreement would have constituted a breach of that collective agreement.

42. We turn to the submission that the respondent's written and oral communications with bargaining unit employees violated sections 15, 64 and 67 of the Act. Section 64 and subsection 67(1) provide:

64. No employer or employers' organization and no person acting on behalf of

an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

As with section 15, the purpose of subsection 67(1) and one of the purposes of section 64 is to reinforce both the obligation to recognize the trade union's bargaining rights and the prohibition against the use of economic power to undermine those or any other statutory rights associated with collective bargaining. As the language of section 64 reflects, these purposes can be achieved without enjoining all employer communication with employees. Nevertheless, any assessment of the scope of the freedom of expression reserved to employers by section 64 must be sensitive to the labour relations context in which it is made and must strike a balance between that freedom and the freedom to associate which these and other provisions of the Act are intended to protect (see *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) at 617). The employer's freedom to communicate with employees cannot be used to undermine the trade union's bargaining role: *Radio Shack, supra*, at paragraph 75 and *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393, at paragraph 18.

43. In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals. The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect. Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect: *A.N. Shaw Restoration Ltd.*, *supra*, at paragraphs 19 to 22 and *The Citizen*, [1979] OLRB Rep. Mar. 177 at paragraphs 57 to 64; and see *Fruehauf Trailer Company of Canada Limited*, [1975] OLRB Rep. Jan. 77; *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583; *Globe and Mail*, [1982] OLRB Rep. Feb. 189.

44. When the respondents' communications with employees are considered against the backdrop of its dealings with the trade union during the period in question, we find that they constitute interference with the trade union's representation of bargaining unit employees, contrary to section 64 of the Act. French and Carette say they could not have anticipated that the trade union would refuse its consent to salary adjustments. Its refusal to do so when denied full particulars of the proposed adjustments was entirely foreseeable to anyone with a basic understanding of a trade union's proper role in collective bargaining. In any event, by the end of the day on February 22, 1985, French and Carette needed no crystal ball - they knew that coupling a request for consent to salary increases with a refusal to say what the increases were or discuss the matter in collective bargaining had ensured that PSAC would not consent and had created dissension between PSAC and bargaining unit employees. The respondents' actions and communications thereafter were calculated to exploit the disruptive potential of the position they had put PSAC in and weaken PSAC's support among the employees it represented.

45. The respondents' intention to disparage the trade union, and their willingness to sacrifice accuracy in order to do so, are apparent from the repeated references in French's written communications to PSAC's responsibility for delays in the fair treatment of employees, the incorrect assertion in Carette's March 29th telegram that PSAC had failed to do something it had undertaken to do, the incorrect implication in the April 23rd memorandum that PSAC had given no reason for its refusal to salary adjustments and the suggestions in French's June 22nd speech that the union had some ulterior motive for handling these matters as it had. Whatever may have been the real time constraints on Forintek's implementing salary adjustments, it timed and framed its communications about them so as to maximize the sense that urgency precluded discussion and to instill in employees the belief that there could be no improvements of this kind on any terms other than those unilaterally determined by their employer and that any attempt by PSAC to meaningfully discharge its role as bargaining agent would only stand in the way of such improvements. We are unable to believe that these obvious and foreseeable effects of their behaviour were not foreseen and intended by French and Carette.

46. In addition to their telegrams, memoranda and speech, there were also the respondents' meetings with members of the local executive in the absence of Kearney or any other representative of PSAC. Carette said he had understood from past dealings with PSAC that the local had considerable autonomy and, as a result, he had dealt directly with the local's executive on previous occasions. French explained it had been his practice to have an introductory meeting with each new local President at a convenient time after his or her election. The union did not challenge the accuracy of these general statements - it challenged the adequacy of them as an excuse for what took place in meetings French and Carette had with Hogan and other members of the local executive. Past practice cannot explain or excuse meetings held after February 22, 1985, when Kearney made it perfectly clear that he was the spokesperson for PSAC with whom Forintek would have to deal on matters involving salary adjustments and collective bargaining. That established the protocol for Forintek's communications with PSAC on those issues. Not every communication thereafter with a member or members of the local executive constituted a departure from that protocol and thus a violation of the Act. For example, Carette's brief discussion with Hogan on March 25th represents the kind of innocuous peripheral reference to collective bargaining which can only be expected to arise in workplace conversation. By way of contrast, French's summons of and meeting with Hogan on March 8th did not involve the innocuous small talk of a get-acquainted meeting. French's conversation with Hogan, an employee whom he knew was not PSAC'S spokesperson on the matters under discussion, was for the obvious purpose of determining the extent that employees supported the position taken by their bargaining agent. As the Board observed in *Securicor Investigation & Security Ltd.*, [1983] OLRB Rep. May 720 (jud. rev. denied April 4, 1985 (Ont. Div. Ct.)) at paragraph 62:

... A trade union, as the representative of all the employees in the bargaining unit, adopts bargaining stances which it considers to be in the best interest of and in line with the bargaining objectives of the membership as a whole and need not reveal to the employer information pertaining to the sentiments of individual members or groups of members or about when and under what circumstances it might be prepared to alter its bargaining position. Any attempt by the employer, or anyone acting on behalf of the employer, to obtain this type of information by going directly to the employees in the bargaining unit, undermines the exclusivity of the union's bargaining rights and, therefore, is in breach of section 64 of the Act...

47. The most objectionable of all the respondents' private meetings with employees was

the meeting of June 11, 1985. Forintek knew, as a result of the experience French recited when explaining his actions of June 12th, that members of the local executive, and particularly its new President, Raymond Dubois, had been instructed not to meet with management except in the presence of a PSAC representative. Forintek knew that Kearney was PSAC'S spokesperson on salary adjustments and other collective bargaining issues. Despite this, Carette summoned Dubois to make known to him positions and offers on those issues which had not been communicated to PSAC through Kearney. His explanation for so doing was his professed belief that Forintek's positions on these issues might not have been made clear to PSAC during conciliation the day before. A belief that this was so does not explain the means chosen to clarify Forintek's position. Carette gave no satisfactory explanation for his failure to communicate the clarification to Kearney in accordance with the established protocol, either at a meeting called for that purpose or by letter or telephone. Although Dubois and the employees who went with him when he answered Carette's summons are described in PSAC's complaint as "representatives of the complainant", in the absence of Kearney they were not PSAC's representatives for the purposes of receiving or responding to the communications Carette wished to make on that occasion, and Carette knew that. The only advantage this means of "clarifying" its position had for Forintek over the other more orthodox means open to it was that it might elicit some immediate response directly from employees rather than through PSAC. We are bound to infer from his actions that that is what Carette hoped would be the result.

48. Carette's actions on June 11th conveyed a message that Forintek would prefer to deal with the employees directly or through their local executive rather than through PSAC representatives, and so violated sections 15 and 64 of the Act. As they involved the communication otherwise than to PSAC of a new offer with respect to collective bargaining matters, they also violated subsection 67(1) of the Act.

49. When the Board is satisfied that an employer or person acting on behalf of an employer has acted contrary to the Act, subsection 89(4) authorizes the Board to "determine what, if anything, the employer ... [or] person ... shall do or refrain from doing with respect thereto." That subsection confers a very broad, although not boundless, remedial authority. We must now consider what would be the proper exercise of that authority in the circumstances of this case, bearing in mind that any order we make must have a genuinely remedial, as opposed to punitive, purpose: *Radio Shack, supra*, at paragraph 90 to 124.

50. In its complaint filed June 20, 1985, PSAC asked that the Board:

- (a) Declare that the Respondents have violated the aforesaid sections of the *Labour Relations Act*;
- (b) Order that the Respondents cease and desist from breaching the said sections;
- (c) Order that the Respondent, FORINTEK CANADA CORP., bargain in good faith;
- (d) Order that the Respondent, JACQUES CARETTE, be prohibited from becoming involved in any manner whatsoever in collective bargaining negotiations;

- (e) Order the Respondent, FORINTEK CANADA CORP., to produce to the Complainant the salary survey which it performed in 1984;
- (f) Order the Respondent, FORINTEK CANADA CORP., to include the item of "salary catch-up" as a negotiating item;
- (g) Order the Respondent, FORINTEK CANADA CORP., to provide particulars as to how the salary catch-up cheques that were distributed were calculated and how the recipients were chosen;
- (h) Order the Respondent, FORINTEK CANADA CORP., to submit a complete proposal that it would be willing to accept as a collective agreement;
- (i) Order the Respondent, FORINTEK CANADA CORP., to pay damages to the Complainant in such amount as the Board shall determine appropriate;
- (j) If violations be found, order the Respondent, FORINTEK CANADA CORP., to post a "Notice to Employees", indicating the said violations and indicating FORINTEK CANADA CORP.'s assurances that it will cease such practices;
- (k) Order the Respondents to pay the legal costs of the Complainant; and,
- (l) Make such further and other order or directions as might be appropriate in all the circumstances.

By letter dated June 28, 1985, the complainant added a request that the Board direct the parties to refer all matters remaining in dispute between them to interest arbitration.

51. At the conclusion of evidence and argument on September 25, 1985, we made an oral ruling which was later recorded in a written decision dated October 7, 1985. That decision read as follows:

1. At the conclusion of our hearing of evidence and argument in this matter we advised the parties that while we did not propose to deliver an immediate and detailed decision covering all the matters put in issue in these proceedings, because of the importance we attached to promoting a prompt resumption of the parties' collective bargaining we did propose to deal immediately with certain aspects of the case.

2. We told the parties it was our unanimous view that the respondent employer had been in breach of its duty under section 15 of the Act to bargain in good faith and make every reasonable effort to make a collective agreement. We observed that this breach had resulted from a significant misconception by the respondent's management of the nature of the collective bargaining process and the role in that process of a trade union bargaining agent. We noted that in all probability the parties' difficulties would continue whatever we might order in this case, if management's approach to and understanding of the collective bargaining process remained unchanged; on the other hand, future difficulties might be avoided and present ones more creatively and appropriately solved at the bargaining table.

if management did reappraise and change that approach and understanding, in which case the future release of a Board decision fully reciting and legally analysing the parties' past behaviour might be counter-productive.

3. Having made those observations, we ruled that the remedies we would award with respect to the respondent's breach of section 15 would include at least those now set out in subparagraphs (a), (c) and (d) of paragraph 5 of this decision, and that the order in sub-paragraph (c) would have been made whether or not the trade union had chosen to provide the authorizations requested by the employer. We advised the parties that a full decision dealing with all of the complainant's allegations and setting out in full our findings, reasons and full set of remedies, would not issue for at least two months, and would not issue at all if the parties both so request within that period or before the decision is released.

4. On reflection, we feel that in order to maximize the possibility that the parties will themselves resolve what our interim oral decision left outstanding, there is one other immediate finding of which the parties should be made aware. We are satisfied that the respondent's implementation of salary adjustments in June, 1985, violated the *Labour Relations Act*. If the parties have by then been unable to fashion their own remedy for this breach, we will address that and all other remaining matters in our final decision.

5. In summary, the Board

- a) declares that the respondent has breached its duty under section 15 of the *Labour Relations Act*;
- b) declares that the respondent's implementation in June, 1985, of salary adjustments for employees in the bargaining unit represented by PSAC constituted a violation of the *Labour Relations Act*;
- c) directs that the respondent forthwith provide the applicant with information concerning the salary of each bargaining unit employee both before and after the aforesaid salary adjustments;
- d) directs that the respondent meet and bargain with the applicant at such times and places as may be prescribed by the conciliation officer presently seized of that role in the parties' negotiations, and that the respondent forthwith contact that conciliation officer to make arrangements in that regard;
- e) reserves for a period of at least two months its final decision on all other issues raised and remedies requested by the complainant.

By letter dated November 5, 1985, counsel for the complainant advised the Board that the parties had not reached agreement, and asked whether the Board intended to allow the parties what he described as "a final opportunity to make submissions as to the appropriate remedies." By letter dated November 11, 1985, counsel for the respondent asserted that, since the Board's preliminary decision, there had been one conciliation session at which the complainant had requested a "non-Board report" and that the respondent had requested that the conciliator reconvene the parties to continue discussions. He submitted that in these circumstances it would be conducive to the resolution of outstanding matters if the Board would withhold its final order and reasons. In the alternative, he submitted that *if* the Board was disposed to hear further argument, it should hear evidence and argument with respect to the behaviour of the parties since September 25, 1985. This led to a letter dated November 18th in which counsel for the complainant took the position that the Board was "*functus* with respect to the question of evidence", opposed the Board's considering evidence of subsequent events and asked that the Board rule on its request for a further hearing on the question of remedy.

52. What we invited and assumed we heard on September 25, 1985, was nothing less than final and full argument with respect to all of the matters in issue between the parties as of that date. The “final decision” contemplated by paragraph 5(e) of our decision of October 7, 1985, was a decision on the matters in issue between the parties as of September 25th. Of course, had a final decision been pronounced on September 25th, the propriety of the parties’ subsequent behaviour might later have become the subject either of a fresh complaint or of a request for reconsideration of that “final decision” or both. Nevertheless, in the circumstances presented by the parties’ correspondence in November 1985, we concluded that we ought to complete the process of determining the original complaint on the evidence and argument heard up to September 25, 1985, even though there might be some delay in doing so, rather than reopen the hearing. Accordingly, on our instructions the Registrar advised the parties that we did not propose to hear further argument, nor to take into account any allegation with respect to conduct subsequent to October 7th, before releasing the final decision contemplated in our decision of October 7th.

53. We will grant the remedies claimed in paragraphs (a), (b), (c), and (j) of the claim for relief quoted in paragraph 50 of this decision. These are entirely common-place remedies in cases of this kind. If any explanation of the necessity or propriety of such remedies is required, it may be found in the Board’s decision in *Radio Shack, supra*. Insofar as they affect the respondent Carette, the declaration and cease and desist order will be with respect to breach of section 64, since sections 15, 67 and 79 are not provisions which can be breached by a “person acting on behalf of an employer.”

54. The concerns which underly the remedies claimed in paragraphs (f), (g) and (h) of the complainant’s claim for relief are adequately addressed by an order that the respondent Forintek comply with section 15 of the Act. The issue of “salary catch-up” is an inseparable component of the issue of salary which so obviously must be the subject of negotiations for the renewal of the parties’ collective agreement. Section 15 imposes on both parties an obligation to engage in rational discussion. Rational discussion requires that each party to provide a full justification for its own position on each item, and particularly on monetary items: *Canadian Industries Limited*, [1976] OLRB Rep. May 199 (and see, *Royal Conservatory of Music*, [1985] OLRB Rep. Nov. 1652 at paragraphs 35 to 38). If the position Forintek takes at the bargaining table is premised on the appropriateness of the salary distribution which resulted from the salary adjustments of June 1985, then the basis for the salary adjustment decisions may well be something the respondent will be obliged to disclose, if asked, in order to comply with section 15. It would be inappropriate in framing the remedy in this case to dictate or speculate about the course proper negotiations ought to or might take, other than to require that they comply with section 15 of the Act. Forintek’s obligation to provide particulars as to how the salary catch-up cheques were calculated and how the recipients were chosen will depend on the position it takes in bargaining. Of course, section 15 requires each participant in bargaining to take a position and to state, when asked, what collective agreement it would be willing to sign. Parties to collective bargaining often refrain from demanding that the opposite party crystalize anything other than its opening position until their negotiations are well beyond the stage these parties’ negotiations had reached by September of 1985. A direction that the respondent submit a complete proposal is a piece of remedial boiler plate which in this case would add nothing to our direction that the respondent bargain in good faith and make every reasonable effort to make a collective agreement and, indeed, would detract from the focus of this decision, which is on the past unwillingness of the respondent

to discuss and explain its position rather than on any unwillingness of the respondent to take positions.

55. It would not be appropriate to order that the respondent Jacques Carette be prohibited from becoming involved in any manner whatsoever in collective bargaining negotiations, as the complainant asks in paragraph (e) of its claim for relief. We have found and will declare that the respondents Forintek and Carette violated the *Labour Relations Act*, and will order that both respondents cease and desist from breaching the Act. Both respondents will no doubt be mindful of the consequences to them of violating these orders, having regard to the provisions of subsection 89(6) of the *Labour Relations Act* and section 13 of the *Statutory Powers Procedure Act*. The respondents can best assess how to comply with the Act and avoid those consequences. However much Mr. Carette may be responsible for the decisions and behaviour which caused or constitute Forintek's violations of sections 15, 64, 67 and 79 of the Act, we are not in a position to say that further breaches are inevitable if his involvement in collective bargaining negotiations continues. The right of each party to collective bargaining to select its representative without interference by the other is not one with which the Board will lightly interfere, even in these circumstances.

56. Counsel for the complainant observed that its claim for an order directing that the parties proceed to interest arbitration was a novel one, but submitted this ought not to stand in the way of the Board's adopting it as a remedial response to the unique problems created by the combined effect of Forintek's implementation of salary adjustments and the other violations which we have found here. Counsel argued, and we are persuaded, that the unilateral change in wages may have narrowed the range of positions that the complainant can realistically take in bargaining and still retain the support of the employees it represents. Counsel submitted that if the matter of salaries were referred to interest arbitration along with all other matters in dispute, then the complainant's ability to influence the result would be unimpaired by the damage the respondent had caused to the complainant's bargaining power. While the form of the proposed remedy may be unique, its nature is not. This Board has on many occasions dealt with the proposition that it should respond to particularly serious violations of section 15 by deciding the terms of a collective agreement and imposing it on the parties. The Board has consistently held that this is not a remedy which it ought to, or indeed, can provide: *DeVilbiss (Canada) Limited, supra*, *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309; *The Daily Times*, [1978] OLRB Rep. July 604; and *Radio Shack, supra*. The reasoning in those cases applies with equal force to an order which obliges the parties to abide by the terms of a collective agreement imposed by the some third party other than the Board. The added remedial request contained in the complainant's letter of June 28, 1985 is, accordingly, denied. We are left to consider what other remedy or remedies would be responsive to the complainant's legitimate concern about the effects on collective bargaining of the respondent's improper implementation of salary adjustments in June of 1985.

57. Generally, the logical response to an improper unilateral alteration in the employment *status quo* is one which the complainant has not sought: a direction that the *status quo* be restored. It is not hard to see why the union would not seek that remedy here; to do so would only further the respondents' purpose, which was to make it appear that the union was intent on acting contrary to the interests of employees. It is apparent that the respondents have not been totally successful in alienating bargaining unit employees from the complainant; there has been no application by any bargaining unit employees to terminate the complainant's bargaining

rights. Of course, that does not show that there has been no damage to the relationship between the PSAC and bargaining unit employees. The damage done may be ameliorated, at least in part, by informing bargaining unit employees of the results of this application and of the findings of this Board. That is one of the purposes of the “posting” remedy which we have already indicated will be granted here. We propose in this case to take the concept of that remedy one step further, and direct that Forintek provide each employee in the bargaining unit with a copy of this decision made and delivered at the Forintek’s expense. In addition, and in consultation with PSAC, Forintek shall make arrangements for a one hour meeting of bargaining unit employees with representatives of PSAC during working hours, in the absence of members of management and without loss of pay, so that the PSAC can review with them this decision, the then outstanding issues in collective bargaining, the materials referred to in the next paragraph or any other subject it considers relevant to its role as the employees’ exclusive bargaining agent.

58. As a result of our decision herein dated July 26, 1985, (reported at [1985] OLRB Rep. July 1050) representatives of the trade union had an opportunity to examine the TSK salary survey and related documents, but this was under a strict constraint that any knowledge thus acquired could be used only for the purpose of the proceedings before this Board and not for collective bargaining or any other purpose. At this point, then, the trade union is unable to speak to employees about the contents of the survey. It is thus unable to respond to earlier employer communications which suggested that salary adjustments were for the purpose of implementing that survey and thereby lent them an aura of fairness and objectivity on which the employer relied in denigrating the union’s refusal to consent to them. We have concluded it would be an appropriate remedial response to the employer’s violations of the Act to require the unconditional production to the complainant of the TSK salary survey and the related documents which were put before the Board in the course of its hearings. In so ordering, we should not be taken to have decided that the respondent was under a collective bargaining obligation to produce those documents when they were requested at meetings held prior to the unilateral implementation of salary adjustments. Had the parties’ collective bargaining proceeded to a point at which the required rational explanation of the respondent’s position on salary involved a reference to the data or conclusions contained in that survey, it might then have been argued that section 15 required the respondent to produce the documents or disclose their contents: see *General Electric Co. v. NLRB*, 466 F 2d 1177, 81 LRRM 2303 (USCA, 6th Cir., 1972). Here the survey and related documents are ordered produced as part of a remedy for the respondent’s illegal implementation of unilateral salary increases, and it is unnecessary to determine in this decision whether the duty of disclosure in this jurisdiction extends to salary or wage surveys.

59. The justification for an award of damages for breach of the duty imposed by section 15 of the Act and the basis on which such damages might be assessed were both explored at length in *Radio Shack, supra*, at paragraphs 96 to 115, *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722, and *Fotomat Canada Limited*, [1982] OLRB Rep. July 1020. While not every instance of bad faith bargaining should result in an award of damages (see *Canada Cement Lafarge Ltd.*, *supra*, at paragraph 26), we are satisfied that such an award is necessary in this case. In accordance with the Board’s usual practice where damages are claimed and liability for them is disputed, the parties did not lead and the Board did not entertain the evidence necessary to assess the quantum of those damages, leaving that issue to be determined in a later hearing if liability were found and the parties were thereafter unable to settle the issue of quantum. At this stage our direction with respect to damages will be in general terms, and we will retain jurisdiction to deal with quantum if the parties are unable to settle it.

60. Finally, there is the complainant's request for an order that the respondents pay the legal costs of the complainant in these proceedings. In *Radio Shack, supra*, the Board dismissed a similar request and observed:

The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successful defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

Those concerns apply with equal force to the circumstances of this case, which in our opinion do not warrant reconsideration of the policy announced in *Radio Shack*.

61. In summary, and in addition to the declarations and directions set out in our decision of October 7, 1985, the Board

- (a) declares that the respondent Forintek Canada Corp. violated sections 15, 64, 67 and 79 of the *Labour Relations Act* and that the respondent Jacques Carette violated section 64 of the *Labour Relations Act*;
- (b) orders that the respondents cease and desist from breaching the said sections;
- (c) orders that the respondent Forintek Canada Corp. bargain with the complainant and make every reasonable effort to make a collective agreement;
- (d) directs that the respondent Forintek Canada Corp. forthwith cause copies of the attached notice marked "Appendix" to be signed by its President and posted in conspicuous places at its laboratories in Ottawa where bargaining unit employees are employed, including all places where notices to such employees are customarily posted, and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that these notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant from time to time to satisfy itself that this posting requirement has been and is being complied with;
- (e) directs that the respondent Forintek Canada Corp. forthwith deliver to each employee in the bargaining unit a copy of this decision, which copies shall be made and delivered by the respondent at its expense;
- (f) directs that the respondent Forintek Canada Corp. in consultation with the complainant make arrangements so that representatives of the complainant can meet with bargaining unit employees for a period of at least one hour during working hours without employee loss of pay and in the absence of members of management;
- (g) directs that the respondent provide the complainant with copies of

- (i) the Report of Thorne, Stevenson & Kellogg entitled "Maintaining Fair Compensation At Forintek - Final Report" dated December 1984 - a copy of which was marked as Exhibit 30 in these proceedings;
- (ii) the 3 page letter from Thorne, Stevenson & Kellogg to the respondent dated November 23, 1984, and the 5 pages of "computer runs" referred to in that letter, copies of which were marked as Exhibits 39A and 39B in these proceedings;
- (iii) the compilations of proficiency ratings copies of which were marked as Exhibits 29 and 46 in these proceedings; and,
- (iv) the Salary Survey Report summary and two attached pages, copies of which were marked as Exhibit 31 in these proceedings,

and declares that in its use of these documents the complainant shall no longer be under any constraint arising out of its having earlier had production of them for a limited purpose in these proceedings;

- (h) directs that the respondent pay to the complainant and to all bargaining unit employees compensation for all losses that the complainant can establish by reasonable proof as arising from the respondent's illegal acts, including damages for the loss of opportunity to negotiate a collective agreement during the period February 22 to September 25, 1985, together with interest.

We remain seized with this complaint for the purpose of resolving any dispute over the implementation of these directions or the quantum of the damages awarded, but if in the period of one year following the release of this decision neither party requests that this matter be relisted for hearing, it shall be terminated.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH FORINTEK CANADA CORP. AND THE PUBLIC SERVICE ALLIANCE OF CANADA HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERE WITH THESE RIGHTS.

WE WILL NOT REFUSE TO BARGAIN COLLECTIVELY WITH THE PUBLIC SERVICE ALLIANCE OF CANADA AS THE EXCLUSIVE BARGAINING AGENT OF ALL EMPLOYEES COVERED BY OUR LAST COLLECTIVE AGREEMENT WITH THAT TRADE UNION.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH THE PUBLIC SERVICE ALLIANCE OF CANADA IN ITS REPRESENTATION OF EMPLOYEES UNDER THE ACT.

WE WILL MAKE WHOLE THE PUBLIC SERVICE ALLIANCE OF CANADA FOR ALL LOSSES SUFFERED BY REASON OF OUR REFUSAL TO BARGAIN IN GOOD FAITH AS DIRECTED BY THE BOARD.

WE WILL MAKE WHOLE ALL BARGAINING UNIT EMPLOYEES WHO SUFFERED LOSSES BY REASON OF OUR FAILURE TO BARGAIN IN GOOD FAITH AS DIRECTED BY THE BOARD.

WE WILL COMPLY WITH ALL OTHER DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD INCLUDING:

- (1) PROVIDING EACH BARGAINING UNIT EMPLOYEE WITH A COPY OF THE BOARD'S DECISION,
- (2) PROVIDING THE PUBLIC SERVICE ALLIANCE OF CANADA WITH COPIES OF THE THORNE, STEVENSON & KELLOGG SALARY SURVEY AND RELATED DOCUMENTS;
- (3) PROVIDING AN OPPORTUNITY FOR REPRESENTATIVES OF THE PUBLIC SERVICE ALLIANCE OF CANADA TO MEET WITH BARGAINING UNIT EMPLOYEES FOR A PERIOD OF ONE HOUR DURING WORKING HOURS WITHOUT LOSS OF PAY;

WE WILL BARGAIN COLLECTIVELY WITH THE PUBLIC SERVICE ALLIANCE OF CANADA WITH RESPECT TO THE SALARIES TO BE PAID TO EMPLOYEES IN THE BARGAINING UNIT IT REPRESENTS.

FORINTEK CANADA CORP.

PER: _____
PRESIDENT

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0056-85-U; 0058-85-U; 1270-85-R James Meikle et al, Complainants, v. Retail, Wholesale & Department Store Union Local 414 and the Great Atlantic and Pacific Tea Company of Canada Limited, Respondents, v. Edward Jenner and John Yuill, Intervener #1, v. Dominion Stores Limited, Intervener #2; Tom Hinton, Complainant, v. Retail, Wholesale & Department Store Union and Don Collins, Respondent, v. A Group of Employees at the Toronto Area Great Atlantic & Pacific Company Limited Warehouses, Intervener; James Meikle and Tom Hinton and a Group of Employees, Applicant, v. **Great Atlantic and Pacific Tea Company Limited** and Retail, Wholesale & Department Store Union, Local 414, Respondents, v. Dominion Stores Limited/Willett Foods Limited, Intervener

Collective Agreement - Duty of Fair Representation - Sale of a Business - Unfair Labour Practice - A & P purchasing Dominion warehousing operation - Integrating with own operation - Union agreeing to expand A & P agreement to include Dominion employees resulting in entailing of seniority - Whether circumvention of statutory consequence of sale unlawful - Whether Dominion agreement terminated contrary to s.52 - Whether union representing both groups having conflict of interest - Whether process followed or terms of agreement accepted constituting unfair representation of Dominion employees

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members W. A. Correll and P. J. O'Keeffe.

APPEARANCES: James Fyshe, James Meikle and Tom Hinton for the applicant/complainants; Paul Cavalluzzo and Don Collins for the respondent RWDSU Local 414; Derek L. Rogers and T. A. Zakrzewski for the respondent Atlantic and Pacific Tea Co.; R. C. Filion and Charles R. Robertson for the intervener Dominion Stores Limited; L. N. Gottheil and Edward Jenner for the intervener group of employees of Atlantic & Pacific Company Ltd.

DECISION OF THE BOARD; April 30, 1986

I

1. The Board hereby directs that the above application/complaints be and the same are hereby consolidated.

2. This is a complaint alleging violation of section 68 and an application pursuant to section 63 of the Ontario *Labour Relations Act* as a result of the purchase by the respondent Great Atlantic and Pacific Tea Company Limited (hereinafter referred to as "A & P") of the "warehouse operation" of the intervener Dominion Stores (hereinafter referred to as "Dominion"). It was not disputed that the transaction by which A & P acquired the warehouse operation (and, in addition, some ninety-two Dominion Stores) constituted a "sale" within the meaning of section 63 of the Act. The parties did disagree, however, as to the legal impact of that transaction on the Dominion warehouse employees. It should also be noted here that the employees at both Dominion and A & P are represented by Local 414, Retail Wholesale & Department Store Union (RWDSU).

3. Six witnesses testified. The Board has assessed their testimony according to the usual criteria, including the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their demeanour while testifying and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered.

4. The Board has some specific comments about the credibility of the witnesses. There was relatively little conflict in the testimony of the various witnesses. Moreover, the Board was impressed with the candour of the witnesses generally. J. Meikle, for example, is regarded as sincere in his recounting of the events to the best of his recollection. It must be emphasized, though, that Meikle was not in attendance at the meetings between the RWDSU officials and representatives of A & P concerning the proposed sale. The testimony of those who did attend was unshaken on cross-examination and the Board has no hesitation in accepting that testimony. Nor could Meikle, when compared with D. Whilsmith, be considered to have particular expertise with respect to the feasibility of A & P servicing an expanded retail chain without the Dominion warehouse operation. And, Collie (another witness called by the complainant) indicated his opinions on that issue were in the context of direct shipments from manufacturers, not supply by wholesalers. Having weighed and assessed the testimony, in the context of the foregoing, the Board makes the following findings of fact.

II

5. In the 1970's, Dominion was acknowledged as the leading retail grocery chain, with over three hundred stores. At its height, the bargaining units at Dominion (stores and warehouse) represented by the RWDSU totalled over 8,000 employees. By the end of that decade, however, Dominion's position began eroding, a slippage which continued into the 1980's. Several examples are illustrative: all but one of the Quebec outlets were sold to Provigo; in Ontario, approximately 48 Dominion stores were closed and then operated as franchises under the name "Mr. Grocer", while other stores were simply closed or sold to competitors. The number of Dominion stores remaining by 1984 was less than half of the 1970's peak figure.

6. As noted, this complaint concerns the Dominion "warehouse" employees. The Metropolitan Toronto warehousing operation for Dominion consisted of a large, modern facility at the West Mall (which included a freezer facility previously located on Steeles Avenue) and a produce facility at Rogers Road. This operation, too, suffered from the general decline in Dominion's fortunes. By 1985, layoffs reduced the worker complement to only one shift of roughly 350 employees. Not unexpectedly, these employees all had considerable seniority with Dominion. It should also be noted at this point that the warehouse included an in-house trucking operation with some forty drivers.

7. The most recent round of negotiations between Dominion and the union resulted in the ratification of a collective agreement in November 1984 with respect to the warehouse (and a separate collective agreement covering the stores' employees at about the same time). During these negotiations, the Dominion owners (C. Black and M. Black) intimated they might well divest themselves of the retail chain. Newspaper articles reflected the uncertainty

surrounding Dominion's future, an uncertainty shared by the union officials and Dominion employees. That concern grew throughout 1984 amidst rumours of possible purchase of the Dominion enterprise; Labatt's, Molsons and Miracle Mart were mentioned as possible buyers.

8. In early February, 1985, D.J.M. Brown, acting for A & P, telephoned J. Hayes, solicitor for the union, informed him that A & P was about to announce a potential partial acquisition of Dominion enterprises and requested a meeting with union officials as soon as possible. An initial introductory meeting was arranged for February 6th. Attending were Brown, two senior officers with A & P (U.S.A.), Hayes and D. Collins (Canadian Director, RWDSU). Brown advised the union that his client intended to purchase some 93 Dominion stores (the final figure was 92) and possibly the warehouse operation, if suitable arrangements could be worked out. The company wished to learn the union's response to the proposed transaction. The first meeting was relatively brief; the second meeting, however, was arranged for February 13th.

9. As at February 13th meeting, Brown and the senior A & P officials (U.S.A.) were present for A & P; Collins, Hayes and R. Higson (Local Director of Local 414 appointed by Collins, in effect as the "international representative") represented the union. Meetings were also held on February 20th and 22nd with similar, if not always identical representation of the company and union. Rather than set out each meeting as discrete events, it is appropriate to recount the discussions at the meetings taken together.

10. Both the stores and the warehouse operation were discussed. With respect to the stores, A & P indicated a willingness to retain the employees associated with each store purchased (including those on leave or laid-off) but not to recognize the seniority of employees generally, i.e., not to permit "bumping" of more senior employees between stores. As to the warehouse, the union's position that the Dominion collective agreement should operate concurrently with the A & P warehouse collective agreement was flatly rejected by A & P. In the company's view, while the stores purchased would continue to operate with a separate corporate identity (i.e., New Dominion Inc.), the warehouse would be an *integrated* operation servicing both A & P and "New Dominion" stores, and hence, the A & P collective agreement should cover the entire operation.

11. In all but one respect, the company's position was outlined in a memo from Brown to the union, dated February 20, 1985. That is, A & P could: (a) not purchase the warehouse operation but, rather, expand their existing facilities and work forces to accommodate the new stores; (b) purchase the warehouse operation but run an integrated operation in the context of the A & P warehouse collective agreement and with preference to the existing A & P work force. It should be noted here for clarity that a third possible option surfaced at about this time, that is, that A & P would purchase the warehouse but close the facility for some indefinite period of time. The February 20th memo also referred to the possible dovetailing of the seniority lists of Dominion and A & P employees after a period of twelve months. Brown testified this dovetailing proposal was initiated by himself alone and at once repudiated by his clients who insisted throughout that A & P employees would not be displaced as a result of the acquisition. It was not disputed that the seniority of the Dominion warehouse employees far outweighed that of their A & P counterparts and, thus, any dovetailing would have displaced virtually all of the A & P employees, at least from their current positions and shifts. The union agreed to meet with the store and warehouse bargaining units once an official document from A & P with respect to their intentions was received.

12. The discussions between the union and A & P, however, did result in several positive guarantees by A & P with respect to Dominion warehouse employees who would be retained by A & P following the sale. With respect to the pension plan, A & P agreed to maintain the more favourable Dominion plan for those Dominion employees. Moreover, A & P consented to a preferential hiring practice accorded to former Dominion employees, even those on layoff without recall rights at the time of the formal sale. The union persuaded A & P, which utilized a common carrier for its own trucking, to retain the Dominion fleet operation (about 40 jobs were involved). It should be noted that, had A & P ultimately decided not to retain the trucking operation, the company had also agreed to permit the drivers to bump into warehouse positions on the basis of seniority (compared with other Dominion warehouse employees). The company ultimately agreed, as well, to recognize Dominion seniority with respect to benefits, including vacations, but not otherwise (see paragraph 13 *infra*).

13. That document, in the form of a memo from Brown dated February 27, 1985, was received, along with another memo of the same date dealing with the legal aspects. It is appropriate to set out both memos in full at this juncture:

February 27, 1985 (memo #1)

This memorandum is to assist you with the meeting of your members employed in the Dominion Stores warehouse operation scheduled for next Sunday.

As you know, A & P is purchasing 93 retail stores from Dominion Stores Limited. A letter of intent has been executed and the purchase agreement is scheduled to be signed on or before the middle of March.

The 93 retail stores, of course, will require warehousing support and A & P have been analysing how this support ought to be given.

From the studies carried out by A & P personnel, it is clear that the operation of two separate warehousing operations would be inefficient and does not make business sense. Accordingly, one way or the other, the warehousing operation for the 93 Dominion Stores and the operations for the A & P stores must be operated as an integrated business. From a labour relations point of view, it is impossible for this to occur with two operating collective agreements. This fact has often been recognized by the Ontario Labour Relations Board and it is something that the A & P operating personnel are most acutely aware of.

As I mentioned to you at our meeting as well, A & P is concerned that there be no undue affect on its existing operations or employees. Accordingly, it has concluded that the only way in which it can operate the warehousing function is:

1. that only the Local 414 - A & P collective agreement operate; and
2. protecting the seniority rights of the A & P employees.

The A & P management are examining a number of ways in which this result can be achieved. As I mentioned to you on Friday, one such method would be to conduct all operations out of its present facilities using wholesalers and direct shipments from suppliers to offset the additional volume that would result from the addition of 93 stores.

This approach would continue until a new warehouse facility could be obtained either by building a new warehouse or converting the Dominion facility at the West Mall into an A & P warehouse.

The legal consequences of this would be either that no sale of a business would occur or even if it did and the Dominion employees were intermingled, since the members would be less than 25% of the existing Dominion workforce, (about 50 additional employees) the Labour Board would exercise its authority pursuant to 63(6)(a) and declare the Dominion Store (Willetts) agreement to be no longer operative.

The net effect of this approach would be that all but 50 or 60 of the present jobs held by employees under the Dominion collective agreement would be lost. This is something that A & P would prefer not to happen because of the adverse affect it will have on jobs now being filled by employees who have been employed by Dominion for some considerable time. On the other hand, we know we cannot integrate the operations without a single contract.

Following a day long session reviewing the entire matter, the A & P management have decided that they could continue the West Mall facility and affect a changeover to the A & P system without closing it down although this would result in some substantial inefficiencies and they are prepared to do so if the Dominion warehouse employees would agree that the A & P warehouse contract took the place of the Dominion warehouse contract for all of the warehousing facilities.

If that is agreed to by your members then A & P will develop plans to continue to operate the West Mall warehousing operation rather than close it down.

Also, the A & P management have stated that they will take your advice and see if it can purchase the fleet from Dominion even though it has no experience in managing a fleet. The effect of this of course would be to preserve approximately 40 jobs that would otherwise disappear.

As well, to ensure that the Dominion warehouse employees would not have to give up the pension benefits to which they would be entitled, A & P would red circle those pension benefits and maintain them at the same level as under the existing Dominion agreement. A similar approach would be taken with regard to recall rights.

As to seniority, A & P would recognize the length of service and seniority of the Dominion warehouse employees for all purposes except to the extent that it might interfere with the seniority rights of A & P personnel. That is, A & P would recognize length of service for purposes of payment of wages and other benefits.

A & P would also agree to extend a hiring preference (subject to any rights A & P employees have) to all former Dominion employees for its warehouse operations.

While there can be no guarantees as to employment, the A & P personnel advise that they would expect the combined operation to require approximately 250 Dominion warehouse employees since the trucking operation would be continued, and it is hoped that the combined expansion of both the Dominion and A & P stores in the future would follow the path of A & P in the past, which will create future jobs. Thus, while the former Dominion warehouse employees' seniority at A & P would follow the existing A & P employees, it is hoped that the foreseeable future will be a period of additional employment, not reduced employment.

Accordingly, we would hope that the present warehouse employees would view this as a most fair and reasonable proposal, and would see it to be one in their best interest to accept.

On the other hand, if it is not accepted, then A & P will be back where we were in our discussions last week; namely, seeking to reach the goal of a single warehouse operation using the existing A & P warehouse as a base supplemented by wholesalers and direct deliveries.

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February 27, 1985 (memo #2)

I am attaching a copy of the agreement to be entered into by Local 414 with regard to the basic Ontario bargaining units. A similar agreement will be entered into in each of the northern bargaining units.

As we discussed, the change being made is not a change in the terms of the collective agreement; rather, it is recognizing the redefinition of the bargaining unit in the same terms as would the Ontario Labour Relations Board without incurring the expense that would be associated with that proceeding.

The agreement of purchase and sale is expected to be signed on or before the 15th of March and the transaction is conditional upon the bargaining units being redefined so that they only embrace the stores being purchased.

Upon the signing of the purchase agreement, A & P will implement management control over the operation of the Dominion Stores being purchased. The agreement also contemplates that at the same time by execution of the attached agreement and those relating to northern Ontario bargaining units will be redefined. Upon that happening, offers of employment in the form of Exhibit "C" will be made available to all of the employees at the stores being purchased. The employees in the stores purchased will continue to receive the same benefits and terms of employment. The only difference is that they will not be able to transfer to stores not purchased by A & P and similarly, persons not employed in those stores will not be able to transfer into the stores covered by the purchase agreement.

Operationally, A & P will operate these stores as "Dominion Stores" using the "Dominion" logo. It intends to employ many of the same management people at least up to the level of district manager. As a result, there will be very little impact in terms of operations for your members employed in the stores being purchased by A & P.

It is hoped by A & P personnel that rather than being in a decline, that the new Dominion Store operation which it will conduct will experience the same sort of growth as has the A & P chain of stores.

Following your meetings which I understand will be informational meetings on Sunday, March 10th we will arrange for execution of the attached agreement and the similar agreements to be entered into in relation to the northern bargaining units.

14. A summary at this point of Brown's discussions with A & P concerning the eventual proposal is necessary. Blake, Cassels and Graydon was retained in late January by A & P; Brown was to deal with the labour relations aspects, a corporate partner with the commercial side. A letter of intent, dated February 7, 1985, was signed between A & P and Dominion; this relatively brief document was expressly made not legally binding. The letter of intent had referred to A & P as a "successor" employer in respect of Dominion stores and warehouses. Once the letter of intent was signed, however, that document had served its purpose. The clauses therein did not appear in later, legally binding agreements. The corporate counsel commenced negotiation of the definitive agreement while Brown initiated contact with the union, as noted.

15. In the week preceding the February 27th memo, Brown reviewed the transaction options with senior A & P officers (U.S.A.) in a day long session in Montvale, New Jersey. Initially, A & P did not wish to integrate the Dominion warehouse operation, i.e., either that

operation would not be purchased or, if bought, would be closed for an indefinite period. As a consequence of the lengthy discussions with Brown, A & P reached the proposition to be put to the union. That is, the company would purchase the warehouse, including the trucking fleet, on the basis that the operations would be expeditiously integrated with the A & P warehouses under the A & P collective agreement. There had been a brief consideration of running a combined operation with two collective agreements (i.e., the A & P and the Dominion warehouse contracts). This was soon discarded as an impractical option. An early mention of dovetailing of seniority was also repudiated by A & P (see paragraph 11 *supra*). The signing of the definitive agreement covering the commercial transaction was postponed until after the union accepted the company's "labour relations" offer and those documents were executed.

16. Collins, Canadian Director RWDSU, testified that there was no doubt in his mind that, unless the union accepted the company's proposition on integration, A & P would either not purchase the warehouse operation or acquire but close the facilities. He stated that accepting the A & P offer on integration was the only means to preserve approximately 250 jobs, including the transport employees. That is, if A & P did not purchase the warehouse operation, what remained of the Dominion retail operation would not require the West Mall/Rogers Road facilities. The Toronto warehouse operations would be closed and the remaining Dominion stores serviced out of the Kitchener (Willett) warehouse (as, in fact, is presently the case). [It should be noted that both Collie and Meikle conceded that the Dominion warehouse would close if that operation was not purchased by A & P.] Of course, if the warehouse was purchased but closed by A & P, those jobs would be lost too. Collins also testified that, in his considerable experience with A & P over the years, relations had not always been pleasant, but "when A & P says something, they normally follow through on their commitments", that "I have never found them (A & P) to make idle threats".

17. Collins stated that he accepted the information provided by Brown, as A & P's solicitor, as accurate. Brown testified that he was certain, both that A & P would not purchase and operate the warehouse unless its offer to the union was accepted, and, further, that Dominion would proceed with the sale of the stores in any event. Indeed, Brown stated that A & P was committed to its initial position of not operating the warehouse at all, that it was he who dissuaded them from that stance during the discussions in Montvale (see paragraph 15). Collins' assessment, also in the context of his lengthy experience with retail grocery chains, was that the A & P option of just purchasing the Dominion stores and servicing through wholesalers and direct shipments from manufacturers was a viable mode of operating. Finally, Collins testified that he felt there was no conflict of interest between Dominion and A & P employees simply based on the fact that the union (Local 414) represented the warehouse employees at both locations. All the information known to the union, in Collins' view, indicated that Dominion's future in the retail grocery business was bleak and that the A & P offer was the only route to salvage the 250 Dominion jobs.

18. It is useful to here also summarize the advice given to Collins by Hayes, as solicitor, in respect of the A & P offer. As to the veracity of Brown's statements concerning the A & P proposition, Hayes accepted Brown's word, given his knowledge of the man over a considerable number of years. To quote Hayes, "if Brown gave his word, it was good", "Brown was the soul of candour throughout (the discussions)." Hayes communicated these views to Collins. Hayes also indicated that everyone was aware of the "drift" by Dominion, that the Dominion empire was heading downhill and, in his view, the A & P offer looked

like the best option and the best deal that could be struck in the circumstances. Hayes readily agreed during cross-examination that it made sense for A & P to buy the warehouse operation but that A & P would only do so, if from their perspective, “everything fell into place”. Further, Hayes advised Collins that, in his opinion, a vote need not be held on the company offer, that Collins had the authority to decide on the offer as he saw fit (see paragraph 21 *infra*).

19. Hayes also offered advice at the March 3rd membership meeting (see para. 20, 21 *infra*). There were statements from the floor that the union should go to the Board claiming successor status under the Act. Hayes replied that the discussion of the successor rights provisions in the Ontario Labour Relations Board *assumed* that, regardless of whether the union agreed to the company’s proposal, the transaction would take place. Hayes stated that that situation would not occur, that A & P would only purchase and operate the warehouse if the company was satisfied the labour relations aspect was in order. Indeed, at the hearing, Hayes commented that he would personally have preferred a dovetailing of the seniority list, notwithstanding the resulting dislocation of A & P employees, but “that option just wasn’t open”.

20. On receipt of the February 27th memo, Collins called a meeting of the Dominion warehouse bargaining unit for Sunday, March 3rd at the Skyline Hotel. Collins testified that, while the bargaining unit chairman (or vice-chairman) would call regular unit meetings, the union itself would convene special meetings as appropriate. Approximately 500 workers attended, including persons employed part-time and on layoff. The February 27th memo outlining the A & P proposal was read out. Collins stated that while the union was not happy with the proposal, this would save jobs and was the best deal possible. Collins stressed that the refusal of the A & P offer would result in the loss of the warehouse jobs. Individuals were permitted to ask questions from the floor. Not surprisingly, many workers expressed their anger and frustration at their situation. In Hayes’ words, the meeting was “not a happy affair”. Topics raised included: wages; unfavourable job assignments; especially for older workers; retirement, etc. The statement by Barrett (the unit chairman) “you have put a gun to our heads and expect us to pull the trigger” probably captures the tenor of the meeting. Nonetheless, the meeting continued until all questions were answered. Further, Hayes indicated that, if there were individual special circumstances, that could be pursued with the company. The meeting itself lasted over three hours. The head table remained afterward to continue discussion with some employees, particularly about more technical matters.

21. The question of putting the decision on the A & P proposition to a vote was raised at the meeting. Hayes had given his legal opinion to Collins that a vote was not required in the circumstances. Collins testified that, although ballots boxes were available, he decided during the meeting against holding a vote for fear that, in the heat of the meeting, the proposition would be turned down. In Collins’ words, there would “then be 250 employees unemployed who didn’t have to be unemployed”. Rather, Collins stated to the workers present that, unless there was some new information raised at the meeting, the union would accept the A & P offer. At the Board hearing, Collins testified that, in his opinion, involvement by the unit negotiating committee and ratification by the bargaining unit, as provided in the constitution and by-laws, was not required in the circumstances. That is, the A & P offer was not a normal collective bargaining situation where the union could negotiate with the leverage of a strike sanction.

22. A similar meeting with employees from the Dominion stores bargaining unit was

held on Sunday, March 10th. Then, on March 11, 1985, the agreements with A & P were executed.

23. On March 15, 1985, a further meeting was held between the union executive (including Hayes as solicitor) and the Dominion warehouse unit committee. The committee sought to persuade the union to obtain a second legal opinion and to appeal the decision to accept the A & P offer. The union declined. A number of other questions were raised, particularly concerning the fears of the older workers for the future. Hayes responded to concerns that older workers would be given difficult jobs and “weeded” out by stating that, if individuals felt strongly about this, he felt confident there could be an agreement with A & P so that a job would not be *offered* to those individuals and, thus, the options of severance pay or layoff from Dominion would remain available. Hayes did raise the matter with Brown and received a positive response. However, as Hayes stated he anticipated, no workers made such a request. That is, both he and Collins felt that “when push came to shove”, the individuals would prefer the jobs.

24. Hayes met with the A & P warehouse unit on March 23rd to explain the A & P transaction; about 80 to 100 workers attended.

25. A number of Dominion warehouse employees, unhappy with the A & P deal, did seek a second legal opinion from Iler, Campbell. A written opinion was received dated March 20, 1985. Two of the individuals initially involved in this process then changed their minds. Barrett and Callaghan (an experienced negotiator in the unit), through a posted notice, formally disassociated themselves from this dissident group and recommended against proceeding before the Board.

26. A considerable number of warehouse employees (approximately 191) did decide to proceed with a complaint to the Board that the transaction triggered the successor rights provisions in the Act and that the union, in accepting the A & P offer, contravened the duty of fair representation. Meikle testified on their behalf. In Meikle’s opinion, the Dominion contract was the more favourable and either both collective agreements could have continued or the union, along with the unit negotiating committee, should have continued negotiations with A & P to improve the deal. Further, that proposal would require ratification by the membership.

27. Once the sale closed, the Dominion warehouse employees offered positions generally signed their acceptances without prejudice to the Board proceedings. Grievances over job assignment as a result of the transfer of A & P employees into “Dominion” positions were also filed. The union has held those grievances in abeyance pending the outcome of the Board proceedings. Meikle himself was “bumped” to the night shift, but in the same classification and testified as to the personal disruption this occasioned.

28. It is appropriate to briefly review the warehouse operations. Prior to the sale, A & P utilized three facilities to service stores: Etobicoke for the bulk of grocery items; Vickers Road for perishable products; Steeles Avenue for frozen goods. The company acquired in the sale the following Dominion warehouse facilities: the West Mall (850,000 square feet) for grocery items and a freezer section also located in the West Mall; Rogers Road for perishable products. In brief, the company integrated the two operations commencing in September 1985 as follows: the Rogers Road facility was closed and the product transferred to the Vickers

Road facility where a second shift was added; product lines were generally shifted from Etobicoke to the West Mall. Some A & P employees transferred to the West Mall facility as the product lines moved. Subsequently, the company more fully integrated the two "work forces" through a "polling" procedure whereby A & P employees could bid on the warehouse jobs (as an integrated operation) in order of seniority, pursuant to the terms of the agreement with the union.

29. It is also useful to set out the factual findings concerning the viability of A & P's option of purchasing only the 90 plus Dominion stores and servicing those stores from existing A & P facilities supplemented by shipments from wholesalers and direct distribution from manufacturers. There was no dispute that the warehouse operations (both the West Mall and Rogers Road facilities) constituted the largest single asset purchased and the Dominion warehouses, especially the West Mall, were modern facilities. Collins testified, however, he had been informed that, even if A & P purchased the warehouse operation, considerable monies would be needed for renovations notwithstanding the "newness" of the West Mall facility. Specifically, Collins was told that the selection system utilized by Dominion had been discarded as inefficient by A & P in their U.S. operations. Brown also testified that A & P's initial preference was not to operate the warehouse and service the expanded A & P chain through its existing warehouse facilities (either increased physically or by adding shifts) supplemented by shipments from wholesalers and directly from manufacturers.

30. The best evidence as to the feasibility of the A & P plan is that of Whilsmith, currently assistant director, warehousing, at A & P. Whilsmith testified that the West Mall operation was inefficient in comparison with the A & P warehouse facilities, that the A & P success was based on rapid store service (often the same day) and flexibility in replacing depleted items. The freezer facility in the West Mall utilized a computer selection machine. That system was removed from Etobicoke two years earlier as inefficient and inflexible. The company did discontinue the computer system at the West Mall and revert to a manual selecting mode. The West Mall grocery facility had operated on a full case handling system. The company also had prior experience with such a system and had discontinued its use. Thus, notwithstanding the "newness" of the system at the West Mall, A & P decided to cease that operating format as soon as possible. The lay out of the building is to be fundamentally reorganized to accommodate the A & P manner of servicing stores. The company plans to eventually service the entire chain with respect to grocery items through the West Mall facility alone.

31. In Whilsmith's opinion, the option of servicing the expanded chain of retail stores was entirely feasible without integrating the Dominion warehouse operation. The Steeles Avenue facility was expandable as was the Vickers Road facility (if necessary, through adding a second shift). Whilsmith acknowledged there was no immediate extra physical capacity at Etobicoke, although there were plans developed the year previously for an addition of some 118,000 square feet. In the interim, however, high volume goods could be supplied through direct shipments from manufacturers. Further, more specialized items and the balance of product needed was available through wholesalers, such as, National Grocers). The company had ongoing experience with both vehicles for servicing stores and, in fact, used wholesalers to supply its Quebec operation. As to the economics of such an option, Whilsmith commented that the "in-house" A & P warehouse operation had to compete with the wholesalers regarding cost effectiveness. The company, as noted, did not operate a trucking fleet but utilized one major common carrier (Wilson's Truck Lines) and some smaller carriers; thus, an increased trucking demand could be accommodated too.

32. Several other matters should be briefly noted. There was a dispute as to whether the A & P warehouse bargaining unit should speak for the warehouse operation at the union convention, held subsequent to the closing of the sale, although delegates had been elected from the “old” Dominion warehouse unit early in 1985. The union executive decided to permit the “Dominion” delegates to attend and participate in the convention as a distinct unit. There were also several requests for information directed to Dominion, particularly with respect to the “Mr. Grocer” proceedings and possible liability. During the relevant time period, no information was forthcoming from Dominion. Finally, Barrett (the Dominion warehouse unit chairman) was promoted to a supervisory position by A & P subsequent to the sale. Barrett attended at the convention as an elected delegate after being offered the promotion. Meikle wrote to the union regarding this; the union replied that Meikle could lay charges if he so wished.

III

33. The Board next sets out the submissions of counsel. The Board has not recounted those thorough and able arguments in detail but, rather, provided a highly abbreviated account. Further, given the disposition of the complaints, the Board has not set out arguments concerning remedy, including submissions as to costs, as sought by the complainants.

34. Counsel for the complainants submitted that the memorandum of agreement whereby the union accepted the A & P proposal contravened section 63 of the Act. That is, section 63 stipulates that the successor employer is bound by the collective agreement in force with respect to the vendor’s business until the Board declares otherwise, in accordance with that section. Counsel asserted that the parties themselves could not agree to terminate the collective agreement and stressed that this conclusion was supported by the fact that a section 63 application may be brought by “any person”. *Loeb Inc.*, [1985] OLRB Rep. May 697 was referred to in support. Further, counsel contended the effect of the parties’ agreement was to alter the term of the collective agreement, contrary to section 52(3) of the Act.

With respect to the duty imposed by section 68, counsel made several submissions. Firstly, it was argued the duty was stricter where professional trade union officials and significant labour relations matters (e.g. seniority) were involved; *Felix Charles*, [1984] OLRB Rep. July 908 and *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35 were cited. Secondly, counsel asserted the union was obliged to fully and independently investigate the circumstances surrounding the proposal but had not done so. In effect, counsel argued Collins’ conclusion that A & P would not purchase the warehouse operation unless its conditions were accepted and/or that Dominion would sell the stores without the warehouse facilities was unreasonable in the circumstances. *Toronto East General Hospital*, [1980] OLRB Rep. Apr. 555 and *Leonard Murphy*, [1977] OLRB Rep. March 146 were cited. It was submitted as well that the union faced a conflict of interest as it represented both bargaining units, could not “balance” the interests of the one unit against the other and should have permitted full consultation with the Dominion employees, including participation by the unit negotiating committee. Indeed, counsel asserted that the conflict of interest was the reason Collins did not stand firm against A & P’s offer, conduct a full investigation and discuss dovetailing of seniority lists. *K Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421 was referred to in

support. With respect to the failure to hold a vote on the A & P proposal, counsel contended that the conflict of interest created an exceptional need for a vote, that the members have a right to express their views, that denial of that right is unacceptable paternalism. In combination, at least, the denial constituted a breach of section 68.

Finally, in reply with respect to section 52, counsel submitted that A & P really stood in the shoes of Dominion regarding the warehouse and, thus, the Dominion agreement must be considered to have been terminated, as a collective agreement could not continue to exist apart from an extant bargaining unit; referred to in support was *Caressant Care*, [1984] OLRB Rep. Aug 1060. Counsel also noted *G.A.C. Industries Ltd.*, [1981] OLRB Rep. June 658. As noted, the Board has not set out counsel's submission, including cases cited, as to costs or with respect to the consequences if the Board found the memorandum invalid.

35. Counsel for the union reviewed the evidence in detail, with respect to the chronology of events, the information available to Collins at the time and his conduct throughout the relevant period, and the objective likelihood of the A & P purchase of the warehouse facilities except on the terms proposed. Counsel submitted that Collins reasonably and honestly believed the course of conduct followed was the only means to save some 250 jobs for Dominion employees and that the A & P conditions for purchase did not constitute a "bluff". Counsel also extensively reviewed the Board jurisprudence. For example, it was argued that the Board generally accords considerable deference to the union where collective bargaining decisions are involved. Further, counsel asserted the Board has approved both dovetailing and endtailing schemes, depending on the circumstances and, while the standard of Board review is stricter where critical job interests are involved, there is nothing improper in decisions which favour one group over another, provided there is objective justification for the union decision. On these aspects, counsel cited: *Dufferin Aggregates*, *supra*; *James Mason*, [1979] OLRB Rep. Feb. 116; *William Geddes*, [1984] OLRB Rep. Feb. 233; *Hawker Industries Limited*, [1976] OLRB Rep. Jan 967; *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014; *Silverwood Dairies*, [1982] OLRB Rep. Aug. 1199. Counsel also argued that Collins sought input from the Dominion employees and that the weight of the evidence did not indicate the A & P proposal was a "ruse", referring to *Softley Cartage Ltd.*, [1982] OLRB Rep. May 766 in support. It was contended that, regardless of the union's constitution and bylaws, if the union turns its mind to the interests at stake and makes a considered and reasoned judgement not to hold a vote, that decision does not violate the duty imposed by section 68 of the Act. Again, cases referred to include: *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791; *K Mart Distribution Centre*, *supra*; *Lilo Rail of Canada*, [1983] OLRB Rep. Sept. 1496. However, counsel submitted that no vote was required under the constitution, or, that Collins' interpretation of the constitution to that effect was not arbitrary or capricious, and, even if a vote had rejected the A & P offer, Collins had the authority to accept. *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309; *K Mart* *supra*; *The Great Atlantic & Pacific Company Limited*, [1983] OLRB Rep. Oct. 1654 were cited. With respect to the alleged conflict of interest, it was argued that the conflict could not arise unless the A & P deal was accepted but, more importantly, the union was required to, and did, face up to the "hard" decision. In this regard, counsel referred to *Humphrey v. Moore et al*, (1963) 375 U.S. 335; Richard M. Brown, "Developments in Labour Law: The 1983-84 Term" (1985) *Supreme Court Law Review*, Vol 7, p.327.

36. Counsel for A & P submitted that the company faced two problems in considering the purchase of the warehouse facilities, i.e., how to avoid the application of two collective

agreements to a single integrated warehouse operation and to ensure that its employees did not suffer as a result of the acquisition. Further, counsel argued the parties could not seek an advance ruling from the Board, citing in support, *Daynes Health Care Limited*, [1983] OLRB Rep. May 632. To resolve the potential difficulties, counsel asserted A & P properly dealt with the Dominion employees' bargaining agent. Moreover, it was argued that the resolution itself, namely, a change in the scope clauses of the Willett ("Dominion") and A & P collective agreements was within the parties' authority. *Frito-Lay Canada Limited*, [1978] OLRB Rep. Sept. 831 was cited on this aspect. Counsel contended that term of the Willett ("Dominion") collective agreement had not been altered, just its contents, in part, and, thus, section 63 of the Act was inapplicable. Counsel also stressed that the Board itself encourages the parties to deal directly with each other to resolve these sorts of problems flowing from a sale, citing: *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 166; *Toronto Star Limited*, [1972] OLRB Rep. Dec. 995; *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214. For the Board to recognize that the parties are best suited to resolve the difficulties occasioned by a sale but to prohibit such resolutions before the transaction is entered into, counsel contended, would amount to an unsound labour relations policy. Finally, counsel reviewed the evidence regarding the relative expertise and knowledge of the various witnesses with respect to the likelihood of the warehouse transaction occurring except on the terms of the A & P proposal.

37. Counsel for the intervener Dominion Stores Limited indicated support generally for the positions taken by counsel for the union and A & P and, thus, submitted that the complaint should be dismissed. Counsel did stress that the evidence clearly revealed that Dominion would not have continued to operate the warehouse facilities if A & P had not purchased those facilities.

38. Counsel for the intervener group of employees of A & P generally supported the submissions of the union and A & P as well. Counsel characterized the asserted conflict of interest between the A & P and the Dominion workers as a red herring in that, without the purchase of the warehouse operations by A & P, the Dominion workers would have lost their jobs entirely. The "end tailing" of the seniority was not sought by the union nor the A & P employees but was the condition of the sale. Moreover, counsel indicated that the A & P employees were sympathetic to the personal circumstances of the Dominion employees as a result of the sale but that the union had sought to protect the Dominion employees as effectively as possible in the circumstances. Counsel submitted that, even viewed as a conflict of interest, the union could not abdicate its responsibility but had to balance competing interests; the result reached should not readily be interfered with given the difficult circumstances. Cases referred to included: *K Mart Distribution Centre*, *supra*; *Softley Cartage*, *supra*; *Dufferin Aggregates*, *supra*. With respect to the section 63 issue, counsel submitted the Board has no jurisdiction to disturb the memorandum regarding the integration of both employee groups and, in the alternative, apart from the duty of fair representation, the Board should not interfere given that the parties were in the best position to deal with the various responsibilities and interests involved. On this aspect, counsel cited: *The Corporation of the City of Kitchener*, [1973] OLRB Rep. June 306; *Kelly Douglas and Company Limited*, [1974] CLRB 77; *Re McCallum Transport Division of Dominion Freightways Co. Ltd.*, (1970), 21 L.A.C. 94; *G & H Steel Service of Canada Ltd.*, [1964] OLRB Rep. Mar. 670; *Re Coulter Manufacturing Ltd.*, (1972), 1 L.A.C. (2d) 426; *Toronto Star Limited*, *supra*.

IV

39. The Board first deals with the section 63 and 52 issues, then the section 68

allegations. The analysis, however, is not amenable to any rigid compartmentalization. It was not disputed that the transaction between Dominion and A & P constituted a sale within the meaning of section 63 of the Act. The issue is whether the memorandum of agreement precludes or avoids the legislative consequences of a sale, namely, to bind a successor employer to the collective agreement of the vendor in respect of the like bargaining unit.

40. It is appropriate to set out the following subsections of section 63 and section 52:

63.-(1) In this section,

- (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

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- (6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

52.-(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

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(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

41. The Board begins its analysis with the following passage from *Frito-Lay, supra*:

5. A certificate issued by the Board initially defines the scope of the bargaining rights acquired by a trade union, imposing a corresponding obligation upon an employer to bargain to the extent of these bargaining rights. This obligation, however, does not preclude the parties

in bargaining from agreeing to some alteration of the bargaining unit established by the Board. Since bargaining units found to be appropriate by the Board are themselves often the product of an agreement of the parties, it would be somewhat inconsistent for the Board to treat its bargaining unit descriptions as being immune from alteration by subsequent agreement of the parties. The Board's bargaining unit descriptions are not carved in stone, and the parties may alter them by agreement, provided that there is no breach of the duty to bargain in good faith or the duty of fair representation.

6. The Board has expressly recognized that, once a collective agreement is made, the source of bargaining rights shift from the certificate to the agreement itself. As the Board stated in *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155, "in effect the collective agreement supplants the rights contained in the certificate and the Board's certificate is spent once the collective agreement is signed". This means that where employees, originally included in the Board's certificate, are subsequently excluded from the scope of the collective agreement, the bargaining agent cannot be said to have retained any bargaining rights in respect of these employees. See *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379.

42. Without repeating in detail the factual findings, what transpired in the instant case was the purported alteration, on agreement of A & P and the union, of the scope provision in the A & P collective agreement so as to include within the bargaining unit the warehouse facilities purchased from Dominion, as of the moment the commercial transaction was finalized. The Board regards it as implicit that, as of the moment the scope clause in the A & P collective agreement was expanded, there was intended a corresponding reduction in the scope clause of the Dominion agreement. The Board notes in passing that the stores acquired by A & P were treated in like manner.

43. The Board affirms the right of the parties to a collective bargaining relationship to alter or amend their collective agreement, on consent, except as to the duration of that agreement, pursuant to sections 52(3) and 52(5) of the Act: *Frito-Lay, supra* and the cases cited therein; *United Forming Ltd.*, [1969] OLRB Rep. Jan. 1073; *Viking Pump Co. of Canada Ltd.*, 54 CLLC 17,084; *Re McCallum Transport, supra*; *G & H Steel, supra* and the cases cited therein. Amendments may concern substantive provisions, such as, seniority, as in *Re McCallum Transport, supra*, or the scope of the bargaining unit itself, as in *Frito-Lay, supra* (see also, *Toronto Star, supra*). It is almost trite to reiterate that a collective agreement is the parties' own document; the parties, subject to very few statutory proscriptions and obligations, must be free to amend that document to respond to changing circumstances.

44. The Board would add that parties should be encouraged to respond to changing circumstances through such consensual amendments. The sale of a business, in particular, may have far-reaching implications for the employees and their bargaining agent. The Board does not provide advance rulings as to the labour relations effects of commercial transactions: *Daynes Health Care, supra*. Moreover, even where the "successor rights" provisions of the statute are found to apply, where the vendor's collective agreement binds the purchaser and the Board does not exercise its authority to terminate those bargaining rights, the parties must still confront the actual impact of the sale, at the latest in bargaining for a renewal of the "vendor's" collective agreement at the appropriate time. That is, section 63 creates some permanence to bargaining rights regardless of changes in ownership; section 63 does not, and cannot, preserve the context in which the collective agreement existed prior to the sale. The parties' resolution of these matters should not lightly be interfered with by the Board.

45. In the instant situation, it is true that the consequences of the purported amendment to the scope clause were far more dramatic than what might usually be expected from that

sort of alteration, i.e., the inclusion or exclusion of a single employee classification. In this case, some 250 employees, cutting across a wide range of job classifications, ostensibly now fell under the A & P collective agreement. The implicit contraction in the Dominion scope clause would be equally dramatic, of course.

46. Counsel for the union argued that the Dominion warehouse collective agreement remained extant for the remainder of its term and the union bargaining rights continued in respect of any new Dominion warehouse operations which fell within the geographic scope of those bargaining rights. If the Dominion scope clause is regarded as contracted to the extent the A & P collective agreement scope clause is expanded, on a technical reading of section 63(2), the "Dominion" collective agreement binds A & P; it is just that there are no employees to which the agreement applies. The Board also notes in this regard that the simultaneous contraction and expansion of the Dominion and A & P collective agreements, respectively, as at the moment of sale, is likely only possible where the same local represents both employee bargaining units or where the prospective purchaser reaches agreement on such alterations with the union representing the vendor's employees and the different union (or different local of the same union) representing its own employees *and* those alterations are to take effect conditional on, but at the moment of, the sale.

47. Even if the amendment is within the parties' authority, there is a significant limitation on the union, a limitation noted in the passage quoted from *Frito-Lay, supra*, (at para. 5) namely:

"The Board's bargaining unit descriptions are not carved in stone, and the parties may alter them by agreement, *provided there is no breach of the duty to bargain in good faith or the duty of fair representation.*

(emphasis added)

The section 68 duty is examined *infra*.

48. The Board need not determine the precise limits on the parties' authority to amend their collective agreement in accordance with section 52(5) of the Act. For the purposes of this case, the Board is prepared to *assume*, without deciding, that the contraction in the Dominion unit that was implicit in the expansion of the A & P unit was beyond the parties' authority because of the consequent practical impact on the Dominion collective agreement, namely, the "emptying" of the Dominion bargaining unit. On this basis, what the parties' purported to accomplish was the transfer of the Dominion employees to the A & P bargaining unit or, in effect, to make applicable all the terms of the A & P contract (including the special provisions regarding pension entitlement for "Dominion" employees, etc.). In the Board's view, there is nothing contrary to the Act in regarding the parties' arrangement from this latter perspective up to the point of the expiry date of the Dominion collective agreement. That is, the arrangement had the legal result of rewriting the Dominion collective agreement so as to replicate the A & P contract (including the special clauses, as noted) but the expiry date of June 21, 1986 for the Dominion contract remained unchanged because of the effect of section 52(3). As it was not disputed that intermingling of employees has occurred as of September 1985, the Board hereby exercises its authority pursuant to section 63(6) to declare that A & P is no longer bound by the Dominion collective agreement, albeit the agreement "rewritten" as noted. The A & P collective agreement is binding on the warehouse employees, including

the “former” Dominion employees, as set out in its scope clause. Local 414, RWDSU continues as the bargaining agent.

49. In the alternative, the Board is prepared to make the foregoing declarations on the basis of intermingling, pursuant to section 63(6) of the Act, as at the date the sale occurred. Applications under section 63(6) generally date from the actual intermingling and the Board has indicated the collective agreement likely operates unless and until terminated by the Board pursuant to section 63(6): *Bermay Corp. Ltd.*, *supra*; *Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526. In *Bermay*, *supra*, the Board considered that a declaration under (then) section 55(6)(a) could only be prospective in effect, although that point was not conclusively determined in that decision. Those comments were made in the context of an application where the employer resisted the union’s bargaining rights and in recognition of the industrial relations stability provided by the operation of what was then section 55(2) of the Act (now section 63(2)). However, the Board does not necessarily regard its authority as so limited given that section 63(6) operates expressly by its terms *notwithstanding* subsections (2) and (3) of section 63. It may well be that the circumstances in which the Board would make a declaration as of the date of sale are quite uncommon. The “sale” cases have generally arisen in a context in which a purchaser is resisting the bargaining rights held by a trade union vis-a-vis the vendor’s business. In the instant case, the parties’ arrangement preserved those bargaining rights in a document which sought to address rationally the exigencies of an integrated operation. That document is subject to the duty of fair representation in respect to the “Dominion” employees. Further, in the instant case, the parties agreed in writing prior to the sale that the warehouse would be run on an integrated basis and the workforces intermingled as soon as operationally feasible. And, importantly, the parties’ agreement was implemented as intended. The Board regards these relatively unique circumstances as providing sound labour relations reasons for making its declarations under section 63(6) effective, in the alternative, as of the date of sale in the present case.

50. Section 68 of the Act reads:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

51. The Board has elaborated on the duty imposed by section 68 in a number of cases. Some have arisen in the context of a decision by the union not to proceed to arbitration of an individual’s grievance, others in the context of negotiations. While this complaint may be regarded as in the latter category, broadly speaking, there are several unique aspects which require specific comment. Both the A & P employees and the Dominion employees are represented by the same local of the same union: cf. *Silverwood Dairies*, *supra*, where the two groups were represented by different unions and *Sofley Cartage*, *supra*, where there were two locals of the same international. While *The Great Atlantic & Pacific case*, *supra*, did concern a local representing two groups of employees for whom bargaining rights had been obtained at different times, the circumstances are not analogous. Here, the union held bargaining rights for the A & P employees and the Dominion employees for a considerable length of time. Both collective bargaining relationships had developed independently through successive contract renewals. Another unusual feature is the manner in which the Dominion employees came to be covered by the A & P collective agreement. The Board does not intend

to repeat the earlier analysis but merely to emphasize the unique context in which the duty of fair representation must be reviewed.

52. In the Board's view, the starting point must be the A & P proposal, the offer to purchase and to operate the warehouse under certain conditions. The section 68 duty clearly requires that a union in such circumstances put its mind to the issues, including the *bona fides* of the offer. In that sense, there must be an investigation. However, what is consonant with a reasonable investigation will depend upon the particular circumstances of each case. In the instant situation, the Board is satisfied that appropriate consideration was given to the *bona fides* of the offer. Collins relied on his knowledge of A & P's behaviour from their bargaining relationship, on advice from union counsel and on his lengthy experience in the retail grocery industry. Collins concluded that A & P was not "bluffing" and, were the A & P proposal rejected, that company would either not acquire the warehouse facilities or acquire but close the operation. While Collins need not be "correct" in his assessment in order to fulfill the duty of fair representation, the Board would stress that, in its opinion, that assessment was, in fact, correct. Based on all the evidence, the Board considers that the A & P offer was not bluff. Moreover, the weight of the evidence supports a conclusion that A & P could have serviced the enlarged retail chain (i.e., including the Dominion stores purchased) though its existing facilities supplemented by direct shipments from manufacturers and deliveries from wholesalers (see paragraphs 28-31). Moreover, the A & P proposal had to be weighed in the context of the decline in Dominion's fortunes in the 1980's. The Dominion bargaining units (including the stores) were shrinking. And, all witnesses agreed that, if the warehouse operation was not purchased by A & P, Dominion would not require the warehouse facilities to service the relatively few Dominion stores remaining.

53. Counsel for the complainants asserted there should have been an "independent" investigation by the union, that there were other potential purchasers interested in the Dominion empire, that the future of Dominion was not entirely bleak given an aggressive strategy outlined by Dominion/Willett in December 1984. With respect, these propositions were not realistic alternatives in February 1985 when the union was confronted with the offer. Collins' conclusion that the A & P offer represented the only means of saving some 250 jobs was not unreasonable and did not violate section 68.

54. The Board also must review the *process* culminating in the acceptance of the A & P proposal. As noted in the factual findings, the union held a series of discussions with the company and then presented the proposal to the membership for discussion. The union is more than the "agent" or "delegate" of the employees in the bargaining units. It is the representative of those employees and entitled to act in its own right: *The T. Eaton Co.*, *supra*; *K Mart*, *supra*; *Softley Cartage*, *supra*. A union is not required to seek approval of each proposal as it arises, although failure to communicate or consult may well generate needless litigation: *The Great Atlantic & Pacific Company*, *supra*; *Softley Cartage*, *supra*. Moreover, the union must be given a considerable latitude in setting strategies and making decisions that will best advance the interests of employees, notwithstanding the expectations of those workers: *Lilo Rail*, *supra*; *Diamond "Z" Association*, *supra*. There is little doubt that the membership meeting at the Skyline was traumatic and emotional for the workers (see paragraph 20). The union, however, permitted full discussion, attempted to answer each question and continued the meeting until all concerns were raised. Apart from the anger and anguish felt by the employees, though, no cogent information was forthcoming to dissuade the union from formally accepting the offer.

55. Counsel for the complainants emphasized the failure of the union to conduct a vote on the A & P offer at the meeting. Quite simply, such a vote is not required: *The T. Eaton Co.*, *supra*. Nor, had a vote been held would the result automatically have been binding on the union: *K Mart*, *supra*. Those cases referred to set out the rationale for those positions which need not be restated here. What is important to note, however, is that Collins decided not to hold the vote on the advice of counsel that a vote was not required by law and because he feared that, in the heat of the moment, the workers might vote against the proposal. In Collins' view, if the vote was negative and the union abided by that result, there would "then be 250 employees unemployed who didn't have to be unemployed". It might well have been politically safer for the union to hold a vote on the assumption that, "when push came to shove", the workers would have approved the proposal to save their jobs. On the other hand, the vote would not have assisted the union in learning the workers' views for those had been expressed at length during the meeting. Nor could the union have "hidden" behind the vote. That is, the union could not abdicate its responsibility as bargaining agent to make a "hard" decision by raising the "will of the majority" as a defence. Thus, a vote would not have aided the union in making its determination and could well have made that decision more difficult politically.

56. It is appropriate at this point to briefly comment on the assertion that the unit negotiating committee should have been involved in the "negotiations" with A & P and the result subject to ratification. To paraphrase the comment in *The T. Eaton Co.*, *supra*, the reality of the matter was that these were not normal negotiations. In this instance, A & P was not required to bargain with the union in respect of the Dominion warehouse operations prior to a sale and, of course, A & P was under no *obligation* to purchase. A & P could simply walk away if the "deal" was not to their liking, subject to the unfair labour practice sections of the Act. The Board does not find a contravention of section 68 in the manner in which the union "negotiated", in the broad sense of that term, with A & P with respect to the proposal.

57. With respect to the *terms* of the A & P proposal, the Board makes several observations. Firstly, the A & P collective agreement cannot be characterized as inferior to the Dominion agreement. In some respects, *some* Dominion employees who were offered positions by A & P benefited from the change, i.e., wages, vacations, safety shoes, long-term disability, shift premium, COLA. This issue, however, is not really relevant. As might be expected, each collective agreement included provisions which were more or less advantageous to various categories of employees. Secondly, the bargain struck between the parties represents a delicate balance of trade-offs; the Board should accord a bargaining agent considerable latitude, a "wide range of reasonableness" in balancing the various competing interests: *Dufferin Aggregates*, *supra*; *Dufferin Concrete*, *supra*. In this regard, it should be stressed that the union, with very little room to manoeuvre within the framework of the A & P proposal, did succeed in improving some terms, with respect to pensions, for example. The union is not required to engage in "brinkmanship" to seek to improve an offer in order to satisfy the duty of fair representation. Indeed, for the reasons given earlier, for the union to have done so in this instance would likely have been ill-advised.

58. Counsel for the complainants asserted the union faced a conflict of interest because it represented both the A & P and Dominion bargaining units. The Board does not agree. The union was confronted with the decision as to whether to accept the A & P offer. The Board

has found that the union reached its determination by considering the relevant factors from the viewpoint of the Dominion employees, e.g., the consequences of refusing the offer, the firmness of A & P's assertion the deal hinged on the labour relations conditions, etc. The union concluded the A & P proposal represented the "best possible deal". In the Board's opinion, that assessment was eminently reasonable and not contrary to section 68.

59. However, even if the decision had been based on a balancing of interests between the A & P and Dominion employees, the Board would not have concluded there had been a violation of the duty of fair representation. In this regard, it is appropriate to refer to several excerpts from *Dufferin Aggregates, supra*:

19. The fact, however, that a union may be required in bargaining to make a hard decision that has a serious economic impact on individuals, up to and including the loss of their jobs, cannot of itself make that decision unlawful. That kind of decision is, moreover, not unusual. In making collective agreements it is practically impossible for unions to avoid making decisions that benefit one class of employees at the expense of another. For example when a union opts for more wages rather than better pension provisions it benefits its younger members rather than the older ones. Trade-offs of that kind are the everyday stuff of collective bargaining.

20. Under the *Labour Relations Act* such decisions are lawful so long as they are not arbitrary, discriminatory or in bad faith within the meaning of section 68 of the Act. In the knowledge that unions are commonly required to make hard decisions affecting their members, those words have been deliberately chosen by the Legislature to avoid undue interference in the internal affairs of trade unions. The Board's powers of review over union actions under the section go only to matters of representation, when the quality of representation falls below the limited threefold standard set out in section 68. The issue in these proceedings, therefore, is whether the union's decision to re-open the contract and effectively allow junior employees to be laid off was arbitrary, discriminatory or in bad faith.

21. There is nothing inherently unlawful in a union making a decision that favours a group of employees over another. From the earliest decisions interpreting section 68 of the Act the Board has recognized the need for unions to have the latitude to make decisions that may favour certain employees at the expense of others. As the Board put it in *Ford Motor Co. of Canada Ltd.*, [1973] OLRB Rep. Oct. 519, in applying what was then section 60 of the Act, (at pp. 525-26):

In practical terms the relationship between members of the bargaining unit and the trade union is one of majority control. The relationship is not strictly one of contract between employee members of the union and the union, but rather the relationship is such that the system created more closely resembles the Legislative process than a contractual relationship; see *Cox, Rights Under a Collective Agreement*, 69 Harv. L. Rev. 601 (1956).

Section 60 of *The Labour Relations Act* seeks to ensure that individual's rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness - it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees, as well as the collective group, members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision.

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32. The first full judicial elaboration of the issue of a union resolving competing approaches to seniority arose in the decision of the Supreme Court of the United States in *Ford Motor Company v. Huffman* (1953) 31 L.R.R.M. 2548. The case involved the negotiation of a clause in a collective agreement which would enable returning military veterans to use their military service prior to employment as credit towards their seniority. The authority of the union to negotiate such a proviso was challenged by union members who had worked longer than the veterans, but would accumulate less seniority under the new arrangement. The court held that "[a] wide range of reasonableness must be allowed" the bargaining representative (at 2551):

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented ... Inevitable differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The Court went on to conclude that in agreeing to give seniority credit for military service the union had not breached the duty of fair representation.

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37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it - rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

60. Thus, if the union's decision had been based on the aforementioned balancing of interests, what the union would have been balancing was A & P's insistence on protecting its employees from dislocation because of the company's acquisition against the prospect of greater job security for the Dominion employees in the A & P organization than in the faltering Dominion empire. To be sure, the Dominion employees might well experience some disruption through bumping to less attractive shifts or positions. But the assessment that such dislocation would be preferable to the loss of a job entirely was not unreasonable. Indeed, the accuracy of that conclusion is borne out by the failure of any Dominion employees to follow up on Hayes' offer to ensure, if possible, an A & P offer was not made to those employees preferring the layoff or severance pay options from Dominion. Moreover, given the relative seniority of the two groups, it was quite understandable from a labour relations perspective that A & P would insist on protection for its employees if it agreed to operate the Dominion warehouse facilities. It must be remembered that A & P initially preferred not to acquire and/or integrate the warehouse operation. Having been persuaded to do so, A & P's insistence on endtailing is not surprising. The Board has approved of endtailing in *Silverwood Dairies, supra*. In fact,

the prospect of greater job opportunities notwithstanding the endtailing noted in that case is applicable here: see also *The Great Atlantic & Pacific Company, supra*. Thus, even on this view of the issues, the Board would not find a violate of the duty of fair representation. The Board would emphasize, though, that dovetailing of seniority lists, as Hayes stated, "just wasn't an option".

61. The Board intends to briefly comment on several other concerns raised by the complainants. The union determined that the "Dominion" delegates, elected prior to the sale, could attend the membership convention as a distinct unit. With respect to the propriety of Barrett attending the convention and accepting a promotion to a position outside the bargaining unit, the union replied to Meikle that charges could be brought under the union constitution if he (Meikle) so wished. The Board regards these matters as outside the scope of section 68. The complainants also raised the question of the "polling" procedure utilized by A & P to integrate the warehouse workforces. The evidence indicated that the union filed grievances on behalf of the Dominion employees displaced from their "old" shifts and/or classifications. The grievances were held in abeyance pending the outcome of these proceedings. In the Board's opinion, at this point, with respect to these grievances, the union has not contravened the duty of fair representation.

62. In conclusion, the Board would comment that the emotional response of the Dominion employees to the events surrounding the sale is understandable. Given their considerable seniority with Dominion, it is not likely those workers ever seriously envisioned a threat to their job security at Dominion or the prospect of being "bumped" from their preferred shifts. Nonetheless, the Board has found that the union represented their interests as well as could be expected in difficult circumstances. That representation certainly satisfies the duty imposed by section 68 of the Act. The Board has recounted its factual findings in some detail in order to clarify the sequence of events for those not privy to the various meetings, for example. The Board hopes that this may be of some assistance in resolving the frustration and anger of the Dominion workers and facilitating the integration of the workers in the warehouse operation.

63. For the reasons noted, the section 68 complaint is hereby dismissed. Further, the Board declares that A & P is not bound by the Dominion collective agreement as of September 1985 or, in the alternative, as of the date of the sale. That is, the A & P collective agreement is binding on the warehouse employees, including the Dominion employees covered by the A & P scope clause, and Local 414, RWDSU is the bargaining agent.

0507-85-R; 0508-85-R; 0509-85-R; 0510-85-R; 0841-85-R International Union of Operating Engineers, Local 793, Applicant, v. **Harnden & King Construction Ltd.**, Respondent, v. Group of Employees, Objectors

Certification - Practice and Procedure - Dispute with respect to positions taken by parties at meeting with Board officer - Board suggesting that officer should review report with parties and have parties sign it

[This decision was inadvertently omitted from the February, 1986 issue: Editor]

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *S. B. D. Wahl, J. Slaughter, F. Amis* and *G. Steers* for the applicant; *Bruce Binning* and *Grant Robinson* for the respondent; *Peter M. Whalen, Louis Doucette* and *Barry McCracken* for the objectors.

DECISION OF THE BOARD; February 7, 1986

1. These are a series of applications for certification that came on for hearing before the Board on January 23, 1986. During the course of the hearing, a preliminary motion was made by counsel for the applicant with respect to the filings made by the respondent in these certification proceedings.

2. After hearing the submissions of the parties, the Board issued the following oral ruling:

The applicant's preliminary motion is dismissed. In our view, what took place before the Labour Relations Officer on the day these matters first came before the Board did not result in an agreement on the parties' respective positions in these matters. The parties' positions were discussed with the Officer and challenges were made to the lists. While the Labour Relations Officer may have recorded the parties' views, the Board, differently constituted, subsequently issued decisions appointing a Labour Relations Officer to inquire into and report back to the Board on the list and composition of the bargaining unit in each of the applications to which this decision relates.

Thus, whatever the position of the parties may have been in front of the Labour Relations Officer prior to the Board appointing an Officer to inquire into the issues in dispute, it appears to us that the Board, differently constituted, in making such a broad appointment, was cognizant of the complexities of determining the composition of the bargaining units in these applications. Therefore, the Board will proceed with these applications based on the positions taken by the parties as of the commencement of the inquiry by the Labour Relations Officer into the list and composition of the bargaining unit.

3. At the hearing of this matter, the Board recognized that the dispute over the parties' respective positions arose, in part, due to the rather informal process followed by the parties and the Officer in these cases on the first day that this matter was scheduled for hearing. The Board indicated to the parties that they could have asked to review the report that the Officer would make to the Board, agree to and sign it. The Board understood that this was not the normal practice of parties that regularly appeared before the Board at the time this matter arose; nevertheless, at the request of any party, the Officer should review his report with the parties before submitting it to the Board and request the parties to sign it, or at the very least, note on the report that that review has taken place. If that had been done in this case, the dispute before this panel of the Board with respect to the positions taken by the parties could have been avoided. In any event, if any party has a concern that the subtleties of its position will not be conveyed to the Board, that party is free to exercise its right to make representations directly to the Board.

4. When the Board formally appoints a Labour Relations Officer to conduct inquiries after the parties have met with an Officer on the first day a matter is scheduled for hearing, as was done in these cases, the Board makes the appointment based upon the report it receives about the parties' meeting with Officer from the Officer. The Board decisions appointing a Labour Relations Officer were not specific with respect to the issues that the parties advised us they clarified at their initial meeting with the Officer. A party could have asked the Board to reconsider and vary the decisions appointing the Officer so that they precisely set out the issues in dispute. That was not done by any of the parties in this proceeding.

5. These matters are referred to the Registrar to be relisted for hearing before this panel of the Board.

3082-85-M Labourers' International Union of North America, Local 506, Applicant,
v. **Highrock Structural Limited**, Respondent

Construction Industry Grievance - Grievance claiming failure to make vacation payments - Arrangement between respondent and employer who took over sub-contract subsequently cannot affect employees' rights earned against respondent

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *J. P. Wilson* and *H. Kobryn*.

APPEARANCES: *Bois P. Wilson* and *Tony Neil* for the applicant; *Domenic Cipriani* for the respondent.

DECISION OF THE BOARD; April 5, 1986

1. The Board delivered the following decision orally at its hearing in this matter on April 1, 1986:

This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*.

The parties agreed that the applicant and respondent were bound by the industrial, commercial and institutional sector provincial agreement between the Labourers' Employer Bargaining Agency and the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council. The parties further agreed that five employees of the respondent were not paid vacation pay for a period of time prior to December, 1985.

The respondent was a sub-contractor to Konvey Construction prior to December 1, 1985. On or about that date, Konvey took over the sub-contract and hired the employees of the respondent. After those employees were hired by Konvey, Konvey made the necessary payments under the provincial agreement in respect of the employees it had hired who were formally employed by the respondent, on and after the time they became its employees. The parties also agreed that Konvey was bound to the provincial agreement to which the applicant and respondent were bound.

The respondent signed a direction and authorization directing Konvey to pay all of the obligations that arose from the respondent being a sub-contractor to Konvey. These payments were to be made from the funds that Konvey owed to the respondent. While Konvey made many payments to the respondent's creditors, it did not pay the five employees the vacation pay they had earned while employed by the respondent. The applicant was not a party to the authorization and direction signed by the respondent.

The respondent's representative submitted that the applicant should seek the vacation pay owed to the employees from Konvey because of the

authorization and direction that it had signed. He also submitted that Konvey should have paid the employees before paying the suppliers that the respondent owed money to and further that Konvey should have inquired whether the employees had been paid prior to them being hired by Konvey.

In our opinion, the authorization and direction, while creating rights as between the respondent and Konvey, cannot affect the obligations that the respondent has to the applicant and its members under the provincial agreement. The respondent was the employer of the employees for the time that those employees earned vacation pay. The arrangement between Konvey and the respondent, to which the applicant was not a party, cannot affect the applicant's right to seek payment from the respondent under the provincial agreement. Whether the respondent can make a claim against Konvey for the vacation pay that is owed to the five employees is another matter that may be dealt with in another forum.

While the respondent's position is understandable, we are satisfied that whether Konvey ought to have paid employees before paying suppliers or whether Konvey should have inquired whether employees were owed money before being hired cannot affect the obligations that the respondent has to pay vacation pay to the five employees represented by the applicant while they worked for the respondent pursuant to the provincial agreement.

Therefore, the Board hereby directs the respondent to pay to the applicant the vacation pay that is owing to the five employees.

The parties further agreed that this panel of the Board should remain seized of the issue of the amount the five employees are entitled to if the parties cannot agree to the amount.

2. After we delivered our oral decision, we recessed in order to permit the parties to meet and attempt to agree on the amounts of vacation pay owing to each of the five employees. Upon our return, the parties advised us that they had agreed on the amounts owing to each of the five employees.

3. Therefore, having regard to the agreement of the parties, the Board hereby directs the respondent to forthwith pay to the applicant the following amounts on behalf of the following employees:

R. Allen	- \$564.73
G. Iannaci	- \$710.00
A. Mantini	- \$584.43
A. Tavares	- \$670.74
A. Tomasoni	- \$830.00

4. The parties also advised the Board that one issue remained in dispute. The applicant contends that the respondent owes G. Iannaci an additional \$500.00. The respondent contends that it paid G. Iannaci the additional \$500.00 that the applicant claims he is owed. The parties agreed that the issue of whether the respondent owes the applicant on behalf of G. Iannaci an additional \$500.00 may be resolved after further meetings between the parties. The parties requested that the Board adjourn this matter *sine die*.

5. Therefore, having regard to the agreement of the parties, the Board hereby adjourns this matter *sine die* for a period not exceeding one year. Unless within that time the parties request that the Board proceed with the matter, it will be terminated.

6. This panel of the Board is not seized with this matter.

1815-85-R International Union of Operating Engineers Local 793, Applicant, v. **Jim Bertram & Sons Construction Ltd.**, Respondent, v. Group of Employees, Objectors

Certification - Construction Industry - Practice and Procedure - Employer seeking after terminal date to amend reply to raise inclusion of person in unit - Allowed in circumstances - Count of employees in construction application determined as of application date - But representative period examined to determine craft employees engaged in

BEFORE: Paula Knopf, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: Jack J. Slaughter and Richard Watson for the applicant; G. Grossman and J. Bertram for the respondent; George Taylor and Arnold Curran for the objectors.

DECISION OF THE BOARD; April 9, 1986

1. The name of the respondent is amended to "Jim Bertram & Sons Construction Ltd."

2. This is an application for certification.

3. In the course of the proceedings several preliminary matters arose for determination.

4. First, the parties disagreed as to whether this application for representation rights of employees involved in construction should be considered together with an application by the same union for certification of the same group of employees engaged in industrial work (Board File No. 2918-85-R). As the applications were filed on two separate dates and involve separate considerations, the Board ruled that they ought not to be consolidated or heard together. Board File No. 2918-85-R was therefore adjourned to a date to be set by the Registrar in consultation with the parties.

5. The second preliminary issue concerned the respondent's desire to amend the reply

to put in issue the question of whether a Mr. Cameron ought to be included in the unit. The applicant objected on the basis that the amended reply was filed after the terminal date. The Board ruled that since this matter could have been raised for resolution by the applicant before the Labour Relations Officer was appointed to inquire into the outstanding issues, and since no possible prejudice has resulted because the report deals with the dispute, the respondent is granted leave to amend the reply as requested.

6. The third preliminary issue concerned the period or point in time that the Board should scrutinize to determine the craft in which employees were engaged for purposes of the application. The applicant asked us to look at the three weeks prior to the application, whereas the respondent argued that the date of the application alone should be determinative. The Board ruled that, as is the invariable practice, the date of the application is the determinative date for establishing the count of employees. But to determine the craft in which they are engaged, a representative period should be examined. See *Di Marco Plumbing and Heating Company Limited*, [1985] OLRB Rep. May 659; *Des-Build Development Limited*, [1983] OLRB Rep. Nov. 1793, *J. & M. Chartrand Realty Limited*, [1978] OLRB Rep. May 423, *Health Construction Inc.*, [1977] OLRB Rep. Oct. 691 and *Johnson Kiewit Subway Corporation*, [1966] OLRB Rep. June 182.

7. All parties have requested the assistance of a Labour Relations Officer to deal with the remaining outstanding issues. That request has been forwarded to the Registrar.

8. This matter is adjourned to a date to be set by the Registrar in consultation with the parties. This panel of the Board is not seized with the matter but is prepared to continue with the hearing of the issues if a hearing can be expeditiously arranged.

0807-85-R; 0808-85-M The International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Applicant, v. **John Hayman & Sons Company, Limited**, and Ontario and King Limited, Respondents

Bargaining Rights - Construction Industry - Whether certificate of accreditation and subsequent operation of province-wide bargaining provisions of Act had effect of binding employer to current province-wide agreement

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *L. C. Collins*.

APPEARANCES: *S.B.D. Wahl*, *J. Harrower* and *Wm. Howard* for the applicant; *Bruce Binning*, *James Thomson*, *George Hayman* and *John Tiefenback* for the respondents.

DECISION OF THE BOARD; April 10, 1986

1. The application in Board File No. 0807-85-R is an application under sections 63 and 1(4) of the *Labour Relations Act*. The application in Board File No. 0808-85-M is a referral of a grievance in the construction industry for final and binding resolution pursuant to section 124 of the Act. The applicant The International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 ("Local 700") seeks a declaration from the Board that there has been a sale of a business within the meaning of section 63 of the Act between the respondents John Hayman & Sons Company, Limited ("Hayman") and Ontario and King Limited. In the alternative, Local 700 seeks a declaration from the Board that Hayman and Ontario and King Limited are one employer for the purposes of the Act.

2. The parties agreed that the application in Board File No. 0808-85-M should be adjourned *sine die* pending disposition of the application in Board File No. 0807-85-R.

3. With respect to the application in Board File No. 0807-85-R, the parties proposed and the Board agreed that the Board should first resolve a preliminary issue of whether Local 700 has bargaining rights for ironworkers employed by Hayman on structural steel work thereby causing Hayman to be bound to the current ironworkers provincial agreement between the Ontario Erectors Association and the designated employee bargaining agency for ironworkers. This decision is restricted to that issue. Local 700 seeks to found its claim that Hayman is bound to the current ironworkers provincial agreement based on the following sequence of events: an application made by the Ontario Erectors Association ("the Erectors Association") for certification as the accredited bargaining agent for all employers who employed ironworkers represented in collective bargaining by Local 700; the subsequent issuing by the Board of a certificate of accreditation to the Erectors Association; and the later subsuming in the ironworkers provincial agreement of the bargaining rights held by the Erectors Association for employers of ironworkers represented by Local 700 and of Local 700's bargaining rights for those ironworkers, by operation of the province-wide bargaining provisions of the Act.

4. The parties agreed to the following facts in the course of dealing with the preliminary issue. Hayman was the general contractor on the construction project which gave rise to the referral in Board File No. 0808-85-M. The project involved structural steel work coming within the trade jurisdiction claimed by Local 700. Hayman subcontracted the structural steel work to Sass Manufacturing Ltd. and Sass in turn subcontracted it to Belder Steel Erectors Ltd. Neither Sass nor Belder have a collective bargaining relationship with Local 700.

At the times relevant to Local 700's claim that it holds bargaining rights with respect to ironworkers employed by Hayman, Hayman was represented in collective bargaining respecting rodmen represented by Local 700 by the London and District Construction Association ("the Construction Association"). Pursuant to that bargaining relationship, Hayman had been bound to a series of collective agreements between the Construction Association and Local 700. These included collective agreements for the term May 1, 1971 to April 3, 1983, signed March 20, 1971; May 1, 1973 to April 30, 1975, signed April 1, 1973; and, May 1, 1975 to April 30, 1977, signed May 1, 1975. The 1971-73 and 1973-75 collective agreements contained the following provision:

Article 29 - Jurisdiction

Any work undertaken by the Employer within the acknowledged jurisdiction of the Union that requires employment of other than Rodmen, such as Structural Ironworkers, Welders, Ornamental Ironworkers, Riggers and Finishers shall be employed in accordance with all the provisions of the representative Collective Agreements covering such classifications.

The Erectors Association made application on June 15, 1972, to be certified as the accredited bargaining agent for all employers who employed ironworkers (not rodmen) who were represented in collective bargaining by Local 700. By a decision which issued May 31, 1974, the Board directed at paragraph 18 that a certificate of accreditation be issued to the Erectors Association for " ... [all employers of ironworkers for whom (Local 700) has bargaining rights in the Counties of Elgin, Essex, Kent, Lambton and Middlesex in the industrial, commercial and institutional and heavy engineering sector of the construction industry], and in accordance with the provisions of section [127(2)] of the Act for such other employers for whose employees the respondent may after June 15, 1972, obtain bargaining rights through certification or voluntary recognition. ...".

5. The parties are in disagreement as to whether Article 29 - Jurisdiction as it appears in the 1971-73 and 1973-75 collective agreements creates bargaining rights respecting ironworkers employed by Hayman. The parties are content, however, to put the interpretation of article 29 aside and have the Board decide whether there is a continuum of collective bargaining relationships between Hayman, the Construction Association, the Erectors Association and Local 700 through to the current provincial agreement which has bound Hayman to it. The Board agreed to proceed in that manner and to do so the Board assumes, without finding, that the wording of article 29 creates bargaining rights with respect to ironworkers.

6. The thrust of the argument made by counsel for Local 700 is as follows. When the 1973-75 collective agreement between the Construction Association and Local 700 was signed on April 1, 1973, to be effective from May 1, 1973, Hayman became bound to the agreement, and thus by article 29. Article 29 is voluntary recognition by Hayman of Local 700 as bargaining agent for ironworkers employed by Hayman. Since the act of recognizing Local 700 occurred subsequent to June 15, 1972 when the Erectors Association application for accreditation was made, Hayman, pursuant to section 127(2) of the Act became bound by the certificate of accreditation issued to the Erectors Association May 31, 1974. By further operation of sections 128(4) and 129(2) of the Act Hayman also became bound to the collective agreement then in effect between the Ontario Erectors Association and Local 700 and, when that agreement expired in 1975, to the 1975-77 collective agreement and subsequent renewals thereof. Under the province-wide bargaining provisions of the Act, the bargaining rights held

by the Erectors Association under its certificate of accreditation with respect to Hayman and other employers covered by it and Local 700's bargaining rights for the ironworkers employed by them were subsumed by the provincial bargaining designations. The Erectors Association became the designated employer bargaining agency for bargaining under the province-wide scheme for, amongst others, the employers bound by its accreditation certificate. Local 700 became part of the designated employee bargaining agency for ironworkers under the scheme. The Erectors Association and the ironworkers employee bargaining agency eventually entered into a first provincial agreement which was effective from May 1, 1978 to April 30, 1980, and have entered into subsequent renewals thereof until the current agreement which expires April 30, 1986. Local 700's bargaining rights for Hayman's ironworkers have been preserved through those collective agreements. Counsel concludes, therefore, that the bargaining rights which Local 700 acquired by Hayman's voluntary recognition of it at the time it became bound to the 1973-75 collective agreement between the Construction Association and Local 700 survive in the current provincial agreement.

7. Counsel submits further that his thesis of the issue is strongly supported by the principles enunciated in several Board decisions, particularly *Newman Bros. Limited*, [1981] OLRB Rep. June 750; *Culliton Brothers Limited*, [1982] OLRB Rep. Mar. 357; and, *Thomas Construction (Galt) Limited*, Board File No. 0035-82-M, an unreported decision which issued July 9, 1982. Counsel asserts that the decision in *Thomas Construction* is closely analogous to the circumstances in the instant case, differing only for the fact that the trade union in *Thomas Construction* acquired its bargaining rights by means of a certificate issued to it by the Board instead of voluntary recognition from the employer. The bargaining rights were acquired by the trade union after a successful application for accreditation had been made by an employers' association to represent employers of employees for whom that trade union held bargaining rights. The certificate of accreditation had been issued on March 11, 1974. In 1982, when an issue arose as to whether *Thomas Construction* was bound to a provincial agreement to which the trade union was bound, the Board found that *Thomas Construction* had become bound by the certificate of accreditation and, pursuant to what is now section 127(2) of the Act by subsequent collective agreements between the Association and the trade union. The Board found further that the bargaining rights underlying those agreements eventually became subsumed in the provincial agreements under the province-wide bargaining scheme and that *Thomas Construction* was bound to those agreements.

8. There is little room for dispute that, if the facts establish the sequence of events described by counsel for Local 700, the bargaining rights established by Hayman's alleged voluntary recognition of Local 700 following the Erectors Association application for accreditation, would be preserved in the current ironworkers provincial agreement and Hayman would be bound by it. The linchpin of counsel's argument is that Hayman, when it became bound through its agent the Construction Association to the 1973-75 collective agreement between that Association and Local 700, voluntarily recognized Local 700 as the bargaining agent for Hayman's employees covered by that agreement. As the argument goes, those employees were its rodmen (Article 4 - Recognition) and its ironworkers (Article 29 - Jurisdiction). The 1973-75 collective agreement, however, is a renewal of the 1971-73 collective agreement which contained the same articles 4 and 29. Therefore, bargaining rights already existed in the 1971-73 collective agreement for rodmen, and, on the assumption already made that article 29 creates bargaining rights respecting ironworkers, for ironworkers as well. Those bargaining rights were continued in the 1973-75 agreement. The bargaining rights of a trade union under a collective agreement flow from the agreement and remain in effect until

they are terminated by the Board (see the Board's decision in *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568 at paragraph 10), or are voluntarily abandoned by the trade union. Therefore, it cannot be said that the act of Hayman becoming bound to the 1973-75 collective agreement was an act of voluntarily recognizing Local 700 as bargaining agent for Hayman's ironworkers. On the contrary, to whatever extent article 29 created any bargaining rights, the Board finds that those bargaining rights existed in the 1971-73 collective agreement and were preserved by renewal of that collective agreement in the form of the 1973-75 agreement between the Construction Association and Local 700. The 1971-73 agreement was executed March 20, 1971, to become effective on May 1, 1971. Therefore, when the application for accreditation was made on June 15, 1972, Local 700 already held bargaining rights for the ironworkers if article 29 created such rights.

9. It is useful at this point to describe briefly what the Act requires of parties and of the Board when an application is made by an employers' association for certification as an accredited bargaining agent of employers. For this purpose, the Board will refer to the current sections of the Act which, for all intents and purposes, were the same as those which were in force at the times material to the Board's decision which issued May 31, 1974 certifying the Erectors Association as an accredited employer bargaining agent. The Board must determine the appropriate unit of employers [section 126(1)] and, pursuant to section 126(2), "[the] unit of employers shall comprise all employers as defined in clause 117(c) in the geographic area and sector determined by the Board to be appropriate.". Next, because of section 127(1)(a) the Board must identify the individual employers who are going to be in the unit. The Board relies on lists of employers filed by the applicant and the respondent trade union pursuant to the Rules of Procedure under the Act governing applications for accreditation. Section 110 of the Rules requires the Board to serve the employers on those lists with notices of the application and of hearings into it. The employers so served are required by section 111 of the Rules to file with the Board information respecting, amongst other things, the bargaining rights, if any, which the respondent trade union has for employees of the employers and whether those employees were at work during the twelve months prior to the application. From the material filed, the Board ultimately makes findings respecting the number of employers in the unit and whether the applicant has the requisite membership support as defined by clauses (a) and (b) of section 127(2) of the Act. If the Board is satisfied that the applicant has sufficient support, it issues a certificate of accreditation. That certificate covers two groups of employers: first, those employers identified as being in the unit on the making of the application and, second, those employers for whom the trade union acquires bargaining rights subsequent to the date of application. A certificate of accreditation describes the unit and lists by names the employers which the Board has found to be included in it as of the date of application.

10. In the instant case, the way in which the lists were finally determined is described in detail at paragraph 6 of the Board's decision of May 31, 1974. It is clear that the parties had a full opportunity to participate in the procedure. In paragraph 14, the Board lists the names of employers to be included in the bargaining unit. Those are the same names which appear in the certificate of accreditation. Hayman's name does not appear in either listing.

11. It is reasonable to conclude, therefore, that either Hayman was not listed by the Erectors Association or Local 700 as an employer for whose ironworker employees Local 700 held bargaining rights as at June 15, 1972, or that the Board dealt with the claim of bargaining rights and concluded that Local 700 did not hold them. Since the decision is silent respecting

the latter possibility, the first conclusion is the more likely one. In any event, since Hayman is named neither in the decision nor the certificate of accreditation, it was not included in the unit found by the Board to be appropriate. Nor was Hayman captured by the "basket clause" of the unit described at paragraph 18 of the decision in the phrase "... and in accordance with the provisions of section [127(2)] of the Act for such other employers for whose employees the respondent may after June 15, 1972 obtain bargaining rights through certification or voluntary recognition ...", because, if article 29 does constitute a voluntary recognition, Local 700 acquired its bargaining rights prior to the application date.

12. Accordingly, the Board finds that John Hayman & Sons Company, Limited was not bound to the current provincial agreement between the Ontario Erectors Association and the Ironworkers Employee Bargaining Agency as a consequence of the certificate of accreditation which was issued to the Ontario Erectors Association on May 31, 1984.

13. If the applicant wishes to pursue further the application in Board File No. 0807-85-R, it should make its request to the Registrar to have the matter listed for continuation of hearing. Having regard to the parties' agreement to adjourn *sine die* the grievance referral in Board File No. 0808-85-M, that application is adjourned *sine die* for a period not exceeding one year. Unless within that time the parties request the Board to proceed with the matter, it will be terminated.

0056-85-R Labourers' International Union of North America, Local 1059, Applicant,
v. **McKay-Cocker Construction Limited**, Respondent

Certification - Construction Industry - Practice and Procedure - Board's rules requiring special form to be used where pre-hearing vote requested in construction certification application - Use of regular certification form technical defect - Application processed as if filed in proper form

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *J. P. Wilson* and *H. Kobryn*.

DECISION OF THE BOARD; April 11, 1986

1. This is an application for certification filed on Form 75, Application for Certification, Construction Industry. Paragraph 10 of the application, in which the applicant may set out other relevant statements, contains the following sentence:

"The Applicant requests that a pre-hearing vote be held in this matter as quickly as possible between the Applicant herein and the existing bargaining agent, namely, Cement Masons International Association of the United States and Canada, Local 115."

2. Section 90 of the Board's Rules of Procedure, which relates to applications made in the construction industry, states:

"An application for certification as bargaining agent shall be made in quadruplicate in Form 75, but, where the applicant desires a pre-hearing representation vote, the application shall be made in Form 1 and sections 3 to 10 apply."

[emphasis added]

While the applicant has not complied with section 90 of the Rules in making its application, it is clear that the applicant is requesting that a pre-hearing vote be taken. In view of section 84 of the Board's Rules of Procedure, which states:

"No proceeding under these Rules is invalid by reason of any defect in form or of any technical irregularity.",

the Board shall process this application as if it had been made in the proper form.

3. The Board hereby appoints a Labour Relations Officer to:

- (1) to confer with the parties as to the description and composition of an appropriate bargaining unit;
 - (2) to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 9 of the Labour Relations Act;
 - (3) to confer with the parties as to the description and composition of the voting constituency, the list of employees as of the terminal date in this matter to be used for the purposes of any vote that may be directed by the Board, the form of the ballot, the date and hour for the taking of the vote, and the number and locations of the polling places;
 - (4) upon consent of the parties to investigate any other matter relating to the application; and
 - (5) to report to the Board.
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2684-85-R United Food and Commercial Workers International Union, Locals 175 and 633, Applicants, v. **New Dominion Stores Inc.**, The Great Atlantic & Pacific Company of Canada Limited, Respondents, v. United Food and Commercial Workers, Local 206, Intervener #1, v. United Steelworkers of America, Intervener #2

Practice and Procedure - Sale of a Business - Union seeking intervener status having no direct interest in proceeding - Possibility that Board decision may be relied on in future proceeding not sufficient to grant intervener status - New Dominion store converted into A & P store through corporate re-organization - Whether sale - Whether intermingling as would cause Board to void New Dominion's agreement and direct vote - Board redefining like unit to resolve apparent conflict between two agreements

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *J. A. Ronson* and *S. O'Flynn*.

APPEARANCES: *Douglas J. Wray* and *W.E. Hanley* for the applicants; *David Churchill-Smith*, *Charles R. Robertson* and *Tom Zakrzewski* for the respondents; *Paul W. Timmins* and *Jim Andress* for intervener #1; *Brian Shell*, *Joseph Ginty* and *Des Bradley* for intervener #2.

DECISION OF THE BOARD; April 7, 1986

I

1. This is an application under section 63 of the *Labour Relations Act*. The relevant portions of that section are as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

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(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a)

any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or

- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

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(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

2. For ease of exposition, the corporate respondents will be referred to simply as "New Dominion" and "A & P". Intervener #2, the United Steelworkers of America, will be referred to as "the Steelworkers". Intervener #1, Local 206 of the United Food and Commercial Workers International Union, will be referred to as "Local 206". "Dominion Stores Limited" will sometimes be referred to as "Dominion" to distinguish it from "New Dominion" which is really a subsidiary of A & P.

II

3. This application relates to a retail food store in Chatham, Ontario. The employees at the store are currently represented by Local 206. The applicants assert that a transaction (or more accurately, a realignment of the business relationship) between New Dominion and A & P amounts to a "sale of a business" within the meaning of section 63 of the Act. The

applicants assert that A & P is a “successor employer” bound by New Dominion’s collective bargaining obligations. The applicants are seeking declaration to this effect together with certain relief under section 63(6) which will be discussed in more detail below.

4. When this matter came on for hearing before the Board on March 3, 1986, the Steelworkers’ union sought to intervene. The Steelworkers argued that the transaction or change of relationship between the respondents which may affect the bargaining rights of Local 206 will also affect the bargaining rights of the employees in the stores where the Steelworkers’ union is the established bargaining agent. That, counsel argues, is a legal interest which entitles the Steelworkers to participate in this proceeding. It was conceded that the Steelworkers have already filed *other* section 63 applications designed to preserve bargaining rights where the Steelworkers’ union already has bargaining rights, and that the Steelworkers have no members or bargaining rights at the Chatham store.

5. After hearing the parties’ submissions, the Board ruled, orally, as follows:

It is apparent that the United Steelworkers of America does not represent any employee in the store or bargaining unit affected by this application. The Steelworkers have no collective agreement affecting such employees. The parties all agree that no findings of fact or law made in these proceedings are binding in any subsequent proceedings involving employees in bargaining units represented by the Steelworkers. The parties also agree that no remedy will be sought or could be given in these proceedings which would affect the rights of the Steelworkers in those stores where it has bargaining rights. The focus of this case is very narrow: a single store in Chatham.

The applicants, the respondents and the intervener, Local 206, all assert that the Steelworkers have no interest in the present proceedings. We agree. There is no doctrine of *res judicata* which could bind the Steelworkers in some later proceeding involving different parties and, in accordance with the law as we understand it stated, for example, in *Oakwood Park Lodge*, one panel of the Board can and sometimes should reach a different legal conclusion even if there is no difference in the facts put before it. Here, of course, it is by no means clear that the circumstances affecting the Chatham store where Local 206 has bargaining rights will be the same as in Windsor where the Steelworkers have bargaining rights.

The Steelworkers have an “interest” in a colloquial sense because the “transaction” which affects the bargaining rights of Local 206 may affect the bargaining rights of the Steelworkers as well, and the Board’s decision or reasoning may be referred to by counsel in some later proceeding. But that does not give the Steelworkers the right to intervene here or to participate as a party in the present proceeding. The rights of the Steelworkers and the employees it represents will be determined in another section 63 application which has already been filed but which has not yet been scheduled for hearing. We do not think the Steelworkers have such interest as would warrant making it a party in this case.

6. After this ruling, counsel for the Steelworkers withdrew and counsel for the remaining parties met in an effort to reach agreement on the facts. Those agreed facts are as follows.

III

7. For many years the applicants, UFCW Local 175 and 633, have represented the employees working in A & P's retail food stores across Ontario. For many years there has been a province-wide, multi-store collective agreement regulating the terms and conditions of employment for those employees. The agreement currently covers approximately 105 stores and 9,000 employees: 3,000 to 4,000 full-time employees, and 5,000 to 6,000 part-time employees. The relevant portions of the "recognition clauses" are as follows:

1.01 The Company recognizes Local Union 175 as the exclusive bargaining agent for *all employees* of the Company in its Retail Stores located in the Province of Ontario, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, Meat Department employees, persons regularly employed for not more than twenty-four (24) hours per week and students employed in off school hours and during the school vacation period.

1.02 The Company recognizes Local Union 633 as the exclusive bargaining agent for *all Meat Department employees* of the Company in its Retail Stores located in the Province of Ontario, save and except persons regularly employed for not more than twenty-four (24) hours per week and students employed in off school hours and during the school vacation period.

1.03 The term "employee" or "employees" as used in this Agreement, unless clearly specified otherwise shall mean only those employees who are included in the bargaining unit, as described in Sections 1.01 and 1.02 above.

PART TIME

1.01 The Company recognizes the Union as the exclusive collective bargaining agent for *all employees* of the Company in its Retail Stores located in the Province of Ontario, *regularly employed for not more than twenty-four (24) hours per week* and students employed during off school hours and during the school vacation period.

1.02 The term "employee" or "employees" as used in this Agreement, unless clearly specified otherwise shall mean only those employees who are included in the bargaining unit, as described in Section 1.01 above.

(emphasis added)

All of A & P's retail employees fall into one of these three employee groupings: "full-time", "part-time", "meat department".

8. In the spring of 1985, A & P purchased some 92 retail food stores from Dominion Stores Limited ("Dominion"). That transaction closed on or about April 29, 1985. The details are not relevant here, save to note that Dominion did not dispose of all of its retail food stores. There are approximately 30 stores still owned by Dominion; however, after April 29, 1986,

that company will no longer be entitled to use the name “Dominion”. We do not know precisely what will happen to those stores, but it is clear that they will not be operated or described as “Dominion” stores.

9. For commercial reasons, A & P initially intended to maintain the separate identity and operation of the 92 stores it had acquired from Dominion. To accomplish this purpose, A & P incorporated a wholly-owned subsidiary named New Dominion Stores Inc. A & P and New Dominion shared an integrated warehousing facility, but the store operations themselves were kept separate. The employees who formerly worked for Dominion became employees of New Dominion, which paid their wages and otherwise assumed the responsibilities of employer. There was no immediate impact on the bargaining rights of the applicants or the employees they represent. Pursuant to section 63 of the *Labour Relations Act*, New Dominion, as a successor employer, assumed any outstanding collective bargaining obligations which Dominion may have had with its employees, including those in the Chatham store. In the Chatham store, the employees are represented by Local 206 which has entered into a collective agreement with New Dominion which is to expire in September 1986. The recognition clause of that collective agreement reads as follows:

1.01 The Union shall be the sole and exclusive bargaining agent for all employees of New Dominion Stores, Inc. at its retail stores in Chatham and Wallaceburg, and the townships of Dover and Chatham, Ontario, save and except Store Managers, persons above the rank of Store Manager, Assistant Store Manager.

1.02 The wages, working conditions and all other matters relative to persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school summer vacation period shall be only as outlined in Appendix “B”.

10. Although A & P decided initially not to integrate the “Dominion” stores into its existing chain of retail foods stores, there was some recognition that these stores had become a part of the A & P corporate family. The integrated warehouse facility is one example, but there were others at the local level. In May 1985, an assistant store manager from the Chatham A & P store spent about a week in the newly acquired “New Dominion” store to assist in the transition. So did a head cashier from the Chatham A & P store. She stayed for only a week, then returned to her own store.

11. Both individuals were “borrowed” because they were handy and, for that brief period, there were no comparable New Dominion employees readily available. The assistant store manager was and continues to be an employee of A & P, excluded from the applicants’ bargaining unit. Because he exercises managerial functions he is not, in any event, an “employee” under the *Labour Relations Act*. The head cashier is an employee in the applicants’ bargaining unit, but, at the time, it was agreed that for the few days that she was “borrowed” to work in the New Dominion store in Chatham, she would continue to be paid and directed by A & P and covered by the provincial collective agreement between the applicants and A & P. Finally, in August 1985, there was a change in the role played by A & P’s “field supervisors” who occupy a managerial position immediately above that of the local store manager. The field supervisor responsible for the Chatham A & P store assumed the additional responsibility to monitor the operations of the Chatham New Dominion Store.

12. On Saturday, January 25, 1986, the Chatham New Dominion store closed as usual at 9:30 p.m. The following day all “Dominion” signs and logos were removed from the

premises and equipment, and A & P signs or logos put in their place. From Monday, January 27th to Wednesday, January 30th, products with the Dominion label were removed from the shelves and replaced by A & P private label stock. This task was accomplished by the local staff, with the assistance of managers and assistant managers from A & P stores in Windsor and Wallaceburg. The Chatham New Dominion store which was previously identified for corporate purposes as New Dominion store number 980, became A & P store number 362. For all intents and purposes, it is now the same as any other A & P store. The A & P assistant store manager who came over in May 1985 to assist in the transition to New Dominion has returned as the manager of what has now become the second A & P store in Chatham.

13. Since the end of January 1986, other New Dominion food stores have been converted into A & P stores - although there are a number of stores which are still being run by A & P as "Dominion" stores. Labour relations policies are controlled centrally by A & P, but New Dominion stores continue to have different pricing, advertising and marketing policies. However, those New Dominion locations recently converted to A & P stores are indistinguishable from the A & P stores covered by the applicants' collective agreement. The employees in Chatham will be paid by A & P, which will undertake all employer responsibilities with respect to unemployment insurance, income tax deductions, Workers' compensation, etc. Indeed, counsel for the respondents advised the Board that, as of February 23, 1986, New Dominion will no longer exist as an independent corporate entity, but will become the "New Dominion Stores Division" of A & P. Counsel for the respondents was not sure of the precise details or time table for winding up the affairs of New Dominion Stores, Inc., nor was he sure whether there would be any formal transfer to A & P of assets nominally owned by New Dominion. He submitted that, as a practical matter, formal legal ownership really does not matter very much because New Dominion was, in any event, a wholly-owned subsidiary of A & P, and thus, subject to its total control. In the case of the Chatham store, A & P has, in fact, assumed total control over the assets, stock-in-trade, equipment and business formerly operated at that location by New Dominion, and has directed the various renovations and changes mentioned above. As counsel for the respondents pointed out, since this business re-organization was "all in the family", the precise legal details are not particularly relevant - at least for labour relations purposes. For example, in the case of the employees working at the Chatham New Dominion store, it is apparent that A & P has, *de facto*, become their employer.

IV

14. The applicants assert that A & P has become a "successor employer" within the meaning of section 63 of the *Labour Relations Act* and has therefore assumed the collective bargaining obligations of New Dominion. They argue that A & P has become bound by the collective agreement between New Dominion and Local 206; but the terms of that agreement are in conflict with those of their own province-wide collective agreement. The provincial agreement recognizes the applicants as the sole and exclusive bargaining agents for all A & P employees in Ontario, while the Local 206 agreement recognizes Local 206 as the exclusive bargaining agent for employees in Chatham and Wallaceburg, and the townships of Dover and Chatham. The conflict is underlined by the fact that there is already an A & P store in Chatham where the employees are covered by the provincial agreement.

15. The applicants further contend that there has been an "intermingling" of employees

that would trigger the remedial responses enumerated in section 63(6) of the Act. The applicants argue that the conversion of the New Dominion store imperils their bargaining rights, since it undermines the intent of the province-wide agreement and raises the spectre of employees currently represented by the applicants under that agreement being transferred to the Chatham or other recently converted New Dominion stores. Ordinarily, any new A & P store would automatically fall within the scope of the provincial agreement. Any business expansion or re-organization would take place within that established collective bargaining framework. Now, there is the possibility that in some circumstances a new A & P store can open beyond the scope of the provincial agreement.

16. Counsel for the applicants points out that there is already an established A & P store in Chatham. If that store were to close, A & P could continue to service its customers from the converted New Dominion store and the applicants' members would be out of a job, with no right of transfer to the job opportunities in their own locality. This, counsel contends, is contrary to their rights and the established practice under the provincial agreement. The applicants urge the Board to declare that A & P is no longer bound by the Local 206 collective agreement - with the result that the employees at the new A & P store will automatically fall within the scope of the provincial agreement. The applicants maintain that the province-wide unit is the appropriate one under section 63(6)(b) of the Act. Alternatively, the applicants assert that the Board should conduct a representation vote to test the wishes of the employees currently represented by Local 206. If the majority of the employees indicate their preference for the applicants, then the Board should declare that the Local 206 agreement is void and that the store falls within the scope of the provincial agreement with A & P.

17. Local 206 argues that there has been no "intermingling" and that, even if there has been intermingling, there is no reason for the Board to hold a representation vote or erase Local 206's bargaining rights. Counsel for the corporate respondents submitted that his clients did not view the situation as a "sale of a business", but in any event there was no reason in law or policy why the agreement with Local 206 should be set aside. In the respondents' submission, there had been no intermingling and the purpose of section 63 was to *preserve* not *extend* bargaining rights. A & P emphasized however that it has had a long-standing and generally amicable relationship with the applicants and Local 206 (which, of course, is another Local of the same union) and is quite content to abide by whatever determination the Board might make. The events precipitating this application arose from efforts by A & P to adapt its organization to meet the challenge of a troubled and highly competitive market. There is no suggestion or allegation of anti-union animus.

V

18. We have no difficulty in concluding that there has been a transfer to A & P of at least part of the business of New Dominion - namely, the Chatham store. Indeed, it would appear that the corporate re-organization described by the respondents will ultimately result in A & P becoming the employer of all of the individuals now working in the New Dominion stores even if those stores continue to operate under the "Dominion" logo. We find that there has, therefore, been a "transfer" of a "business" or "part of a business" from New Dominion to A & P and that pursuant to section 63 of the Act A & P is the successor to New Dominion in respect of the collective bargaining obligations formerly existing between Local 206 and

New Dominion. We have more difficulty with the applicants' assertion that there has been an intermingling of employees within the meaning of section 63(6) of the Act, or that the Board should terminate the bargaining rights of Local 206 or direct the taking of a representation vote.

19. The purpose of section 63 of the Act is to preserve a union's bargaining rights and the employees' collective agreement when a business has been transferred from one employer to another. In the absence of section 63, those rights would be jeopardized simply because of the change in the legal identity of the employer. However, section 63 is essentially conservative in its thrust: it protects such rights as an applicant union may have in the "like unit" that existed prior to the transfer. That is the principle focus of the section.

20. We are not persuaded that the applicants have established an intermingling of employees as contemplated by section 63(6) of the Act. None of the managerial personnel referred to are "employees" within the meaning of the Act (see section 1(3)(b)), nor does their activity or change of role in any way impinge upon or complicate the established bargaining relationship of Local 206. The only member of the applicants arguably "intermingled" with New Dominion employee members of Local 206 is a head cashier who ten months ago spent a week in the Chatham store - and, at the time, she was still paid and treated as if she were part of the provincial bargaining unit and covered by the provincial collective agreement. Currently, there is no intermingling at the level of the bargaining unit employees, nor is there any evidence that such intermingling is likely to occur in the near future. As things now stand, the rationalization of A & P's operation which has done away with a separate legal identity of New Dominion Stores, Inc., has not been accompanied by a transfer of any employees from one collective bargaining regime to another.

21. Even if we were to find a token intermingling which, technically, might trigger the remedies contemplated by section 63(6), we see no reason on these facts to invoke such remedies. The mischief to which section 63(6) is directed is a situation in which there is a *de facto* overlap or merger of bargaining units, so that it is difficult to preserve bargaining rights in the "like unit" without creating operational problems for the successor employer or prejudicing the established rights of the employees. It would make no sense if employees working side by side performing similar tasks were subject to different collective bargaining regimes. In such circumstances, it might also make sense to direct a representation vote to determine which of two unions the employees wish to represent them. But that is not the case here. The "like unit" - the former New Dominion store in Chatham - is easily defined and the employee complement represented by Local 206 has not, in fact, been altered by transfers out of that bargaining unit, or the introduction of new employees who may have different union allegiances. In short, there is no reason at this stage to put the bargaining rights of Local 206 to the test of a representation vote. It may be that some of the employees in the Chatham store may consider it advantageous to be represented by the applicants or enjoy the benefits of the provincial agreement. However, that is not a sufficient reason for the Board to exercise its discretion under section 63(6) of the Act. We should also note that if the employee-members of Local 206 wish to be represented by the applicants, those employees will have the opportunity to exercise that option in about four months, during the open period of their own collective agreement.

22. For the foregoing reasons, the Board is not prepared to declare that A & P is no longer bound by the Local 206 agreement or to exercise its remedial discretion under section

63(6) to direct that a representation vote be taken. However, it is necessary for the Board to exercise its authority under section 63(4) of the Act to define the like bargaining unit and resolve the apparent conflict between the two collective agreements to which A & P has become bound by virtue of section 63(2) of the Act. In our view, the most sensible way of doing so is to amend the provincial collective agreement so as to preclude its application to the former New Dominion store where Local 206 has bargaining rights, and to amend the current Local 206 agreement to make it clear that it does not apply to the other stores that exist or may be opened in the Chatham-Wallaceburg area. Our intention is to preserve but also confine the rights of Local 206 to the store where it had bargaining rights prior to the transaction under review.

23. Having regard to the foregoing and pursuant to section 63(4) of the Act, the Board directs that:

- a) The scope clause of the Local 206 collective agreement is amended to read “the union shall be the sole and exclusive bargaining agent for all employees of the Great Atlantic & Pacific Company of Canada Limited at its retail store at 671 Grand Avenue, East, in Chatham, Ontario, save and except store managers, persons above the rank of store manager, and assistant store manager”.
 - b) The A & P provincial collective agreement for full-time personnel shall include in Articles 1.01 and 1.02 the additional words “and employees at its retail store located at 671 Grand Avenue, East, Chatham, Ontario”. The same words are hereby also added to Article 1.01 of the part-time provincial agreement.
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2128-85-M International Association of Bridge, Structural and Ornamental Ironworkers, Applicant, v. Ontario Hydro, Respondent

Construction Industry Grievance - Employee disciplined for safety infraction - Employer establishing safety requirements higher than in safety legislation - No defence that grievor observed requirements in safety legislation - Grievance dismissed

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *J. A. Ronson* and *W. F. Rutherford*.

APPEARANCES: *Bernard Fishbein*, *Aaron Murray*, *John Donaldson* and *James Phair* for the applicant; *Paul Jarvis* and *Ivor Starasts* for the respondent.

DECISION OF THE BOARD; April 23, 1986

1. This is a referral of a grievance to the Board pursuant to the section 124 of the *Labour Relations Act*.

2. The grievor, John Christie, was suspended for two days without pay for an alleged safety infraction. The grievance alleges that Mr. Christie's suspension was unjustified and, accordingly, that the respondent violated Article 34.7 of the collective agreement that was binding upon the parties at all material times. That provision reads as follows:

Alleged unjustified termination, discharge, suspension or disciplinary action may be grieved beginning at First Step.

3. The grievor was notified of the suspension in question by the following memo:

Memorandum To John Christie Date Aug. 7, 1985

Location or Dept Darlington G. S.

Subject Safety Infraction

On August 7, 1985, you were observed walking steel at the 122.5 elevation R.A.B. in unit #1, as [sic] a result you exposed yourself to the danger of falling more than three (3) meters by not being tied off.

As a result, you will be suspended two (2) days without pay on Tuesday and Wednesday, August 13 and August 14, 1985.

Any further reoccurrences [sic] of this nature will result in further disciplinary action being taken, up to and including termination of your employment.

(signed) A. Big Canoe
General Foreman
Mechanical
Darlington G. S.

4. The grievor has been a journeyman ironworker for about twenty-three years. During approximately fifteen of those twenty-three years, the grievor worked as a connector on structural steel. At the time of the incident which gave rise to this grievance, the grievor had

been employed by the respondent at Darlington G. S. for about a year. He was working that day as a signalman at elevation 122.5 in the reactor number one area where skeleton steel was being erected for the reactor building. Elevation 122.5 is 22.5 meters above ground level. The skeleton steel for that structure was being erected by ironworkers employed by Dominion Bridge ("Dominion") as connectors. As a signalman receiver, it was the grievor's function to watch for hand signals from the erectors and to communicate signals to a tower crane operator by radio. The grievor was performing his duties from an area approximately twenty-four feet north of the Dominion connectors. That area, which was referred to in the evidence as the "Q-deck", consisted of a floored area isolated from the steel skeleton by a barrier. One of the steel members that was hoisted by the tower crane that day was a large diagonal brace. That brace became jammed between two lugs and placed a considerable strain on the choke. The grievor's view of the connectors was partially obscured by a column, and he was unable to communicate with them by voice due to the noise level on the site at that time. Moreover, the connectors were not giving the grievor very many hand signals because they were too busy attempting to move the brace. After attempting to gain a better vantage point by moving east and west along the Q-deck, the grievor, who (not unreasonably) feared that one or both of the connectors might be injured if the grievor gave further instructions to the tower crane operator without a better appreciation of the difficulty that the connectors were encountering and the precise location of their hands, walked south approximately twenty-four feet along a twelve inch wide steel beam to where the connectors had been struggling with the brace for about fifteen minutes. After speaking with the connectors and viewing the situation for a couple of minutes, the grievor "tied off" by squeezing his lanyard together to make a loop out of it, inserting it through a hole in the connector plate, and hooking onto it. After giving the tower crane operator appropriate instructions to overcome the problem that the connectors were experiencing, the grievor unhooked his lanyard and returned to the Q-deck by walking back along the beam.

5. Although he did not see the grievor's initial twenty-four foot walk along the beam from the Q-deck, John Goldie, the respondent's Reactor Superintendent at Darlington G. S., observed him walking back along the beam to the Q-deck. Mr. Goldie's vantage point was approximately 300 feet east of the connectors and twenty feet above them.

6. After returning to the Q-deck, the grievor was advised by the dispatching signalman that the next steel member coming up in the sling was another large diagonal brace. Without waiting to see if a similar problem would be encountered by the connectors in respect of that brace, the grievor again walked along the aforementioned beam to the connectors and did not tie himself off until two or three minutes after arriving there. Mr. Goldie testified that just before the grievor tied off, the grievor and the two connectors simultaneously looked up to where he (Mr. Goldie) was located. It was Mr. Goldie's assumption that the tower crane operator had alerted the grievor by radio of the presence of a member of supervision. However, it was the grievor's evidence that he was unaware of Mr. Goldie's presence, and he firmly denied that he or the connectors looked eastward (towards where Mr. Goldie was situated) before he tied off. The grievor further denied being advised of the presence of Mr. Goldie, or any other member of management, by the tower crane operator. Leo Dwyer, who was one of the aforementioned connectors employed by Dominion, also denied any awareness of Mr. Goldie's presence and contradicted Mr. Goldie's aforementioned evidence that the connectors looked eastward.

7. After the second brace had been placed in position, the grievor again unhooked his

lanyard and returned to the Q-deck by walking along the beam. Mr. Goldie then went to the Q-deck to obtain the grievor's name and badge number.

8. It is clear from the evidence that the respondent is very concerned about safety at Darlington G. S. Each person employed on the site is given a safety policy pamphlet which includes the following safety rule, under the heading "PERSONAL PROTECTIVE CLOTHING AND DEVICES":

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- (2) A safety belt or safety harness, including a lanyard must be worn and the lanyard properly secured when there is a hazard of falling:

3 meters (10 feet) or more;

into operating machinery, or,

into or onto hazardous substances or objects.

9. At a Chief Stewards' Meeting held on April 11, 1985, A. J. McCann, the Darlington G. S. General Superintendent, told the Chief Stewards, including G. Joncas, the Ironworkers Chief Steward, that he was concerned about the deteriorating safety record on the site. After stating that February 1985 had been one of the worst months for accidents in a long time, he told the group that as a result of increased concern regarding working aloft without proper safety equipment, management had found it necessary to increase the penalty for infraction to a two-day suspension.

10. In accordance with that policy, ten tradesmen, including six ironworkers, an ironworker apprentice, and an ironworker subforeman, were given two-day suspensions during the spring of 1985 for working without being properly tied off. One of the ironworkers who was given such a suspension was Aaron Murphy, who was suspended for two days for being exposed to the danger of falling more than three meters by not being tied off on June 4, 1985. Mr. Murphy was working with the grievor as a signalman that day.

11. Each Tuesday morning the foremen conduct safety meetings with the members of their crews, based upon weekly safety topic sheets prepared by the respondent's safety department. One of the topics frequently covered in those meetings is fall prevention. For example, on May 7, 1985, employees were reminded by their foreman that fall protection equipment is required in various situations, including where there is a hazard of falling ten feet or more. The hazard of falls was also one of the topics of discussion at the Tuesday safety meeting held on August 6, 1985, the day before the incident which gave rise to these proceedings. The weekly safety topic sheet for that meeting includes the following direction: "No matter what your job is, use safety devices, lifelines and safety belts wherever possible."

12. Considerable evidence and argument was directed to the matter of whether or not the grievor was part of the "connecting crew" on the day in question. It was the applicant's position that the grievor was part of that crew and, as such, was exempt from the requirements of section 35(1) of Regulation 691 (the "Regulation") under the *Occupational Health and Safety Act* ("O.H.S.A.") by virtue of section 35(6) of the Regulation. Those subsections provide as follows:

35.-(1) Subject to subsection (6), where a worker is exposed to the hazard of falling,

- (a) more than three meters;
- (b) into operating machinery, or
- (c) into or onto hazardous substances or objects,

he shall wear a safety belt or parachute-type harness adequately secured to,

- (d) a fixed support; or
- (e) a lifeline that is securely fastened to the project,

or be protected by a safety net.

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(6) Subsection (1) does not apply to a worker who,

- (a) is proceeding to or from his work position; or
- (b) is engaged in connecting structural members of a skeleton structure.

However, we are of the view that a determination of that issue would not assist us in deciding the grievance since the respondents could, and did, establish safety rules for its employees which exceeded the minimum requirements under O.S.H.A. and the Regulation. As indicated in the aforementioned safety pamphlet, the respondent requires employees to wear a safety belt or harness with a lanyard that is properly secured whenever there is a hazard of falling three meters or more. The only limitation on this requirement in the evidence before us is the indication in the weekly safety topic sheet for August 6, 1985 that safety devices, lifelines and safety belts are to be used “wherever possible”.

13. Mr. Goldie expressed the view in his testimony that it was not necessary for the grievor to “walk steel” on the day in question. Arnold Clarke, the grievor’s foreman, expressed a similar opinion. However, Mr. Clarke was not on the site that day, as he was on vacation. Moreover, Mr. Goldie did not begin to view the scene until after the resolution of the problem which initially prompted the grievor to leave the Q-deck and walk along the beam to where the connectors were working. Under the circumstances, we accept the evidence of the grievor, corroborated by Mr. Dwyer, that the jammed brace on a choke that was under considerable strain created a situation in which it was appropriate for the grievor to “walk steel” in order to be in a position to give appropriate signals to the tower crane operator without creating an undue risk of injury to the connectors. We are also prepared to give the grievor the benefit of the doubt concerning the matter of whether or not he should have arranged for a horizontal lifeline to be strung along the beam, to which he could attach his lanyard before walking on the beam. Messrs. Goldie and Clarke suggested the grievor should have arranged for the Dominion connectors, who were working without being tied off, to sling a horizontal lifeline along the beam for the grievor’s use. However, we accept the grievor’s evidence that he had never been informed by his foreman or by any other member of supervision that he was not to walk on a steel beam to get to a position where he could properly perform his job functions as a signalman receiver, or that he was required to be tied

off while walking along a steel beam to reach such a position. We also accept his evidence that he had learned from his twenty-three years of experience as an ironworker that a lifeline should be located above his head. The testimony of Warren Cox casts further doubt on the safety of using a horizontal lifeline of the type suggested by Messrs. Goldie and Clarke. Mr. Cox, who is currently a business agent for the applicant, has experience both as a signalman and as a structural steel inspector at the Darlington G. S. It was his uncontradicted evidence that the hook on a lanyard "does not slide easily along a three-quarter inch rope" and that "dragging [a hooked lanyard] along a three-quarter inch rope while trying to walk along an iron beam could shorten your life expectancy." Thus, we are not satisfied on the evidence before us that any disciplinary action was warranted on the basis of the grievor's first walk along the beam to where the connectors were working, or on the basis of his subsequent return to the Q-deck. However, the same cannot be said of his conduct when he arrived at the location of the jammed diagonal, nor of his second excursion on the beam.

14. When the grievor arrived at the location of the jammed diagonal, he exposed himself to an unnecessary risk of falling by failing to tie off immediately. Instead, he spoke with the connectors and viewed the situation for a couple of minutes before tying off. When asked about this failure to comply with the respondent's safety policy of which he was well aware, he said: "I suppose I could have tied off immediately. I could have hooked onto anything but I would have had to move again." The minor inconvenience that would be involved in having to tie off a second time did not justify the grievor's failure to comply with this important policy that was designed to ensure his own safety and that of others on the site. That disciplinable conduct was repeated during the grievor's second trip onto the beam. (In view of the grievor's admission that he did not tie off for "a minute or two" after arriving at the place where the connectors were located on the beam, it is unnecessary to resolve the conflict in the evidence concerning whether or not the grievor looked towards Mr. Goldie just before he tied off.) Moreover, the grievor exposed himself to an unnecessary risk of falling by even making that second trip without first attempting to perform his duties from the safety of the Q-deck. It is quite possible that a similar jamming problem would not have been encountered with the second diagonal. If such a problem had been encountered, it is possible that it could have been remedied with signals from the Q-deck on the basis of the better understanding of the situation that the grievor had acquired from his first walk on the steel. The grievor's action of walking out to the connectors that second time, on the unwarranted assumption that a similar problem would be encountered with the second diagonal, displayed an inexcusable disregard for his own safety, and for the respondent's safety policy, by unnecessarily placing himself in danger of falling more than three meters from a location in which he was not tied off.

15. For the foregoing reasons, we have concluded that the grievor did expose himself on August 7, 1985 to the danger of falling more than three meters by not being tied off, in contravention of the respondent's aforementioned safety policy of which he was well aware. The grievor was also aware that the penalty for such misconduct on that site was a two-day suspension. Since there are no mitigating factors and since that penalty falls within the realm of reasonable disciplinary responses to the misconduct in question in the circumstances of this case, we do not find it appropriate to modify that penalty.

16. For the foregoing reasons, the grievance is hereby dismissed.

2800-84-U Civic Institute of Professional Personnel, Complainant, v. The Corporation of the City of Ottawa, Respondent

Discharge for Union Activity - Intimidation and Coercion - Unfair Labour Practice - Whether right to resort to grievance procedure and arbitration right protected under Act - Employer facing grievances against decision to declare positions redundant - Offering grievors alternate positions on condition grievances withdrawn - No violation

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *L. Lenkinski*.

APPEARANCES: *Elizabeth McIntyre*, *Robert St. Eloi*, *David McDonald* and *Narindar Singh* for the complainant; *Frank C. Askwith*, *Q.C.* for the respondent.

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON; April 17, 1986

1. The name of the respondent is amended to read: "The Corporation of the City of Ottawa".

2. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that two grievors, David McDonald and Narindar Singh, have been dealt with by The Corporation of the City of Ottawa ("the employer") contrary to the provisions of sections 66 and 70 of the Act. The facts alleged in the complaint raise the issue of whether the employer violated sections 66 and 70 of the Act when it required McDonald and Singh to withdraw grievances against the employer as a condition of accepting jobs which the employer was obligated to offer to them pursuant to the collective agreement between the employer and the Civic Institute of Professional Personnel ("the union").

3. The Board heard the testimony of McDonald, Singh and John Cyr, the employer's commissioner of personnel services. Each was a credible witness and the significant facts drawn from their evidence and set out herein are not in dispute.

4. McDonald and Singh are planners employed by the employer. McDonald has been an employee for approximately fourteen years and Singh for approximately seventeen years. When the events began which culminated in this complaint, McDonald was a senior planner in the community studies section of the employer's planning branch and Singh was an intermediate planner, urban design section in that branch. They were advised officially in writing on October 4, 1984 that their jobs had been declared redundant by City Council. Both notices concluded with the following statement:

The Community Development Department, in conjunction with the Personnel Department, will assist you in reaching a resolution as to how you wish to respond to this action, in accordance with your Collective Agreement, and will be contacting you in the near future with regard to this matter.

Three weeks later on October 25th, they both filed grievances under the collective agreement, to be processed by the union against the employer. McDonald was subsequently offered the job of junior planner, community studies section and Singh was offered the job of junior administration planner, land use and development division. A second grievance filed by Singh

had been referred to the employer by the union prior to Singh receiving the employer's job offer. McDonald also filed a second grievance with the union, but it had not been referred to the employer at the making of this complaint on January 18, 1985.

5. McDonald's first grievance alleges that the employer:

- (1) failed to re-locate McDonald at the same time his "... job was deleted." in spite of the fact that re-organization had been proceeding for more than a year, during which time several jobs at his level were created and filled;
- (2) withheld from McDonald the report which included the recommendation to delete his job and did not consult with McDonald about re-location or encourage him to look elsewhere;
- (3) failed to give adequate reasons for "... the effective reduction of [his] job to a junior level."; and,
- (4) failed to treat McDonald in an equal manner compared to other employees who were offered re-location either prior to their jobs being deleted or immediately after the event.

The evidence with respect to McDonald's second grievance does not reveal the date when he referred it to the union, but it was some time after he had received the employer's offer of the junior planner position which was formally made by letter to him from Cyr dated December 3, 1984. As stated above, the union did not refer McDonald's second grievance to the employer. The subject matter of his second grievance is that the employer:

- (1) failed to carry out a sincere effort to place McDonald pursuant to the redundancy provisions of the collective agreement;
- (2) demoted McDonald without just cause contrary to the agreement; and,
- (3) treated McDonald unequally with other employees by offering them jobs at a level equal to their redundant jobs and by offering him a job at a lower level than his redundant job.

6. Singh's first grievance includes, *inter alia*, allegations that the employer:

- (1) failed to provide Singh with a copy of reports relevant to the re-organization prior to submitting the reports to committee;
- (2) failed to discuss with Singh prior to the decision to delete his job, the pending re-organization and its potential effect on him;
- (3) failed to provide Singh with an opportunity prior to implementing the re-organization, to discuss it and possible alternative jobs and has given other employees favoured treatment compared with Singh by giving them such opportunity.

Singh's second grievance was filed early in December, 1984 and alleges that the employer:

- (1) failed to use its best efforts to place him pursuant to the redundancy provisions of the collective agreement, in a position similar to his redundant job, having regard to his former salary range and position;
- (2) failed to offer Singh available jobs, similar to his redundant job, for which he applied including three particular intermediate planner jobs;
- (3) failed to respect Singh's professional qualifications and record of service;

(4) breached the agreement by hiring to fill jobs for which Singh was qualified; and,

(5) by doing all of these things, has discharged Singh without just cause contrary to the agreement.

7. McDonald and Singh described their first grievances generally as complaints about the manner in which the employer dealt with them during the various stages of re-organization prior to the formal notices of redundancy. The grievances claim also that the employer's alleged acts and omissions are in violation of general conditions of employment which are preserved by the agreement. While they make similar claim in their second grievances, they described those grievances as complaints about the quality of the employer's endeavours to place them after their jobs had been declared redundant. They claim that the employer failed, when placing them, to have "... regard to [their] former salary range[s] and position[s]." as required by the collective agreement. Their first grievances were heard on December 10, 1984 at the last step of the grievance procedure prior to arbitration. On or about December 13th McDonald and Singh were advised that the employer had refused their grievances.

8. Between October 4th when McDonald and Singh received official notice that their jobs had been declared redundant and December 13th, the employer gave them specifications for some vacant jobs with instructions to identify to the employer those jobs in which they were interested.

9. McDonald received his information at a meeting on October 26th. It was confirmed to him in writing on October 29th and he responded in writing identifying five available senior planner jobs in which he would be interested. It would seem that McDonald incorrectly expected the employer to decide whether he would be offered one of those jobs before he would need to state whether any lower classifications would be of interest to him. McDonald addressed that expectation in another memorandum to the employer on November 1st and went on to name three intermediate planner jobs which would be of interest to him if none of the senior jobs were offered. His memorandum ended with the following comment:

If I am offered one of these lower jobs, I would, of course, continue the grievance that has been filed. The complaint under the grievance is that I was unfairly deprived of my senior position, and that would still be true if I accepted a lower one.

That comment prompted a response from Cyr in a letter to McDonald dated November 6th. Cyr answered a couple of matters raised by McDonald's memorandum, advised him that there would be discussions after all vacancies had been identified and McDonald had made known his preferences before a final decision was made and then concluded as follows:

I just wish to correct your last paragraph ..., that if there are no other City positions available having regard to your classification and salary level, and in the event you are placed in one of the positions that you have indicated an interest, that will satisfy any potential grievance that might exist. In short, you cannot accept a position and still grieve. If you accept a position with the [employer], then no further action can be taken by yourself or the [union].

10. McDonald was not offered any of the senior planner or intermediate planner jobs in which he had expressed interest. He received a formal offer of a junior planner job in a letter from Cyr dated December 3rd and was asked to tender in writing by December 7th his acceptance or refusal of the offer. The letter made no reference to McDonald's grievance. The

deadline was extended to December 18th in another letter from Cyr addressed to the union. No reference was made in that letter to McDonald's grievance. The union responded by letter dated December 20th advising Cyr that McDonald had accepted the junior planner job. Cyr's letter to the union dated December 21st took the position again that the grievance has been satisfied by the offer and acceptance of the job:

• • •

The placement of Mr. McDonald is in accordance with the terms of the agreement and thus satisfies the provisions of Article 9 on the one hand and satisfies the grievance on the other.

• • •

Please confirm to me that the outstanding grievance has been satisfied and the commitment to place pursuant to Article 9 has been complied with.

McDonald confirmed by letter dated January 8, 1985 that he had accepted the position and his letter ends:

... and I accede to your demand that I drop the grievance which the [union] had filed against the City on my behalf.

11. While the detail is different with respect to Singh, the employer took a similar position respecting the relationship between its job offer and Singh's grievances. No formal job offer was made to him until January 10, 1985. He had been given job specifications for open jobs at a meeting on October 26, 1984 and had advised the employer by memorandum dated October 30th of three intermediate planner jobs which were acceptable to him. The formal offer of a junior planner job was made by Cyr in a letter to Singh dated January 10, 1985. Cyr's letter contains the following statements:

This job offer, pursuant to the terms of the Agreement, satisfies the employer's obligation in attempting to place you as a result of City Council, on October 3, 1984 declaring your position surplus or redundant, as a result of re-organization. *It further would satisfy any and all claims or actions initiated to date, launched by yourself through your [union].*...

I would, therefore, request that you provide me with either your acceptance or refusal of this position within forty-eight hours following receipt of this letter to you.

• • •

(emphasis added)

Singh eventually was given until January 25th to decide on the offer on which date he wrote to Cyr accepting the offer and confirming " ... that the job offer satisfies all claims or actions initiated to date by myself through the [union].".

12. The union was involved on behalf of McDonald and Singh throughout the process from the filing of their first grievance until they accepted the employer's offer of the junior planner jobs. Each grievor had independent legal counsel during this period as well.

13. Cyr acknowledged orally to the Board during the hearing, as he had done in writing

to the grievors and the union, that the employer's offers of the junior planner jobs were in fulfillment of the employer's collective agreement obligation. Had McDonald and Singh not accepted the positions offered to them, Cyr admits that the employer would have filled those jobs by hiring persons from outside of the bargaining unit. It is undisputed that the employment of the two grievors would have been terminated. They would have been eligible for termination payments prescribed by the collective agreement, although the grievors and the union expected that payment of termination pay would have been withheld pending determination of their grievances. The employer confirmed in the hearing that payment would have been withheld until the grievances were resolved.

14. The collective agreement between the parties contains a grievance procedure (Article 23) and a provision for final and binding arbitration (Article 24) of grievances not settled in the grievance procedure.

15. In order to answer the question of whether the employer has contravened the Act, the Board must first decide whether the grievors have a right under the Act to have their grievances properly processed by the union under the grievance procedure and arbitration provisions of the collective agreement and then whether the employer has interfered with that right in a manner which contravenes the Act. The employer admits that the two grievors have the right under the collective agreement to have a grievance properly processed by the union through the steps of the grievance procedure to final and binding arbitration. The question is whether that right is also a right under the Act. Both parties told the Board that they were unaware of any Board decisions on point. Whether they are correct that the Board has not dealt previously with the same fact situation facing it in this case, it has frequently had to decide if a particular activity not expressly dealt with in the Act is a right protected by the substantive provisions of the Act.

16. It is clear from the Board's many decisions that an activity does not have to be expressly covered by any one section of the Act in order to be found to be a right protected by the Act's substantive provisions, like sections 66 and 70. A primary purpose of the *Labour Relations Act* is to protect the right of employees to engage in lawful collective bargaining. The legal fruits of the collective bargaining process become the terms and conditions of the collective agreement between the union and employer. Those fruits are preserved by the grievance procedure and arbitration provisions of the agreement. If the agreement fails to provide for final and binding arbitration of disputes arising under the agreement, section 44(2) of the Act deems the agreement to contain the provision set out therein. Were there no grievance procedure and arbitration provisions to enforce the terms and conditions of a collective agreement, either party to the agreement, with impunity, could walk away from their obligations under the agreement. Since section 44(2) of the Act mandates that an agreement provide for the settlement of differences between the parties respecting the interpretation, application, administration or alleged violation of the agreement or be deemed to include such a provision, then the right to have the procedures followed must be a right under the Act. Otherwise one party to an agreement would have no remedy if the other party refused to comply with the agreement, for example, by refusing to name its appointee to a board of arbitration. It follows, then, that the union and, through it, McDonald and Singh have the right to have grievances processed through the steps of the grievance procedure to final and binding arbitration. This right, of course, is subject to the union's exercise of its power to decide the carriage of any particular grievance through the grievance and arbitration procedures of the collective agreement. The union's exercise of that power must be consistent with its duty of fair representation pursuant to section 68 of the Act.

17. The remaining issue is whether the employer has violated sections 66 and 70 of the Act, as the union alleges, by requiring McDonald and Singh to withdraw their grievances against the employer as a condition for accepting the employer's offers of the junior planner jobs. Sections 66 and 70 of the Act provide as follows:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

18. The parties do not want the Board to interpret the article of the collective agreement which deals with positions declared redundant by City Council. They agree that the collective agreement provisions obligate the employer to endeavour to place an employee whose position has been declared surplus or redundant; that the employer has to have regard to the employee's former salary range and position in endeavouring to place him; and that the employer and the employee have to consider the offered position suitable for the employee. They disagree as to whether there is an implied obligation on the employer to consider a claim by an employee that he is qualified to fill vacant positions which the employer has not offered.

19. Employer counsel submits that the employer has done precisely what the collective agreement requires. That is, it has endeavoured to place McDonald and Singh, having regard to their former salary ranges and positions, in positions considered by the employer and by McDonald and Singh to be suitable for each of them. The employer's offer of a junior planner position to each grievor establishes that the employer considered the jobs suitable for them and the employees' acceptance of the junior planner positions satisfies the requirement that the positions be considered suitable by the employees. According to counsel, their acceptance of the positions were individual acts of volition. Counsel admits that the collective agreement gives an employee a right to have a grievance processed through the grievance procedure up to and including final and binding arbitration, but, he submits that there is nothing which prevents an employee from giving up a right or deciding not to pursue it. He contends that to be the case here. Both grievors had begun to exercise their right to pursue a grievance under the collective agreement, but, having had the benefit of support and advice from the union as well as from independent counsel, they tendered their unqualified acceptance of the positions. Therefore, he argues, the grievors cannot now question their decision to accept the offers.

20. Counsel for the union argues that the offers of the junior planner jobs were acknowledged by the employer to have been in furtherance of its collective agreement obligation, not in furtherance of settling a dispute, and that the employer further acknowledged the employees to be suited and qualified for the junior planner jobs. In these circumstances, counsel submits that the employer cannot claim now that the jobs were offered for purposes of settling the grievances filed by McDonald and Singh. Requiring the grievors to withdraw their grievances as a pre-condition to accepting the offer is the same as the employer saying they will not get the jobs, for which the employer has agreed they are suited and qualified, and their employment will be terminated unless they drop their grievances. According to counsel, since the employees had the right to grieve their claim that the employer has declared them redundant and has failed to place them in an appropriate position; and since that is a right protected by the Act, the employer's threat of loss of employment should they not drop their grievances constitutes interference with the employees' rights under the Act. Therefore, contrary to sections 66 and 70 of the Act, the City has sought by threat or coercion to get McDonald and Singh to relinquish their rights under the Act.

21. The facts respecting the sequence of events leave no doubt that the employer forewarned the union and the employees in writing that it was taking the position that an offer of jobs to McDonald and Singh, made pursuant to its collective agreement obligation and accepted by them, would discharge that obligation and resolve the grievances. That position was taken respecting McDonald prior to the making of its offer to him, and respecting Singh, at the same time as making its offer to him. In the face of the employer's position, the grievors eventually relented in the pursuit of their grievances and withdrew them. The choice facing them, as unpalatable as it may have been, was to accept the jobs offered or forego those jobs and take their chances that the arbitration process might produce a better result for them. They chose the sure thing. It is not uncommon that either party to the grievance process in a collective agreement has to make that kind of choice. For example, an employee facing lay-off might file a grievance because his employer has denied his claim under a collective agreement to a particular job. While his employer denies that claim, it acknowledges a collective agreement obligation to offer the employee a different job and offers it conditional upon the employee dropping his grievance. The employee's alternatives are clear, either accept the available job and drop the grievance, or take his chances with the grievance procedure.

22. The question of whether the employer's stance in that hypothetical fact situation violates the collective agreement would be an appropriate one for an arbitrator to decide, as it would be in the fact situation herein. But it is not for the Board to decide in this case whether the employer has interpreted the collective agreement correctly or incorrectly. Nor is it for the Board to decide whether the sequence of events herein demonstrate a settlement of the grievances. Whether or not the events in this case are characterized as a settlement process, it is clear that the employer has been confronted with grievances arising out of its decision to declare the jobs of McDonald and Singh to be redundant; has offered alternative jobs to them and has made the withdrawal of their grievances a pre-condition of them accepting the jobs. The issue for the Board is whether the employer, in making acceptance of its job offers to McDonald and Singh conditional upon them dropping their grievances, was seeking by threat of dismissal, or other penalty, or other means to compel McDonald and Singh to cease to exercise a right under the Act contrary to section 66(c); or was seeking by intimidation or coercion to compel them to refrain from exercising a right under the Act contrary to section 70.

23. As a matter of theory, any compromise settlement of an employee's grievance made conditional upon withdrawal of the grievance might come within the definition of an unfair labour practice. Such a settlement could be characterized as a successful attempt by the employer, to paraphrase section 66(c) of the Act, to compel a grievor or his union, by threat of pecuniary or other penalty, to waive or cease exercising a right available under the Act; that is, the right to enforcement of the collective agreement through the grievance and arbitration procedure. Nonetheless, a grievor, and in many cases a union without a grievor's consent, may waive that right to full enforcement of a grievor's literal rights under the collective agreement. Indeed, the very purpose of the grievance procedure mandated by the *Labour Relations Act* is to bring about settlement of as many disputes arising out of the collective agreement as possible. It would be counter-productive to that objective if a party responding to a grievance is going to be placed at risk of being found in violation of the Act if it makes withdrawal of the grievance a condition of a settlement offer. There may well be particular circumstances where causing an employee to choose between retaining employment and exercising his right to have the collective agreement enforced could be found a violation of the Act, even where it occurs in the course of settlement attempts, but this is not such a case. Nor on its facts is it a case of the employer acting out of retribution because the employees had filed grievances.

24. The union and the employer have an honest disagreement over the scope of the employer's obligation and employees' protections under the redundancy provisions of article 9 of their collective agreement. They have sought unsuccessfully to resolve their differences as they related to McDonald and Singh. In the process, the employer may have played hardball with the union and the employees but, on the evidence before the Board, it was nothing more. While an arbitrator might have found the employer to have violated the collective agreement by its interpretation of article 9 of the agreement and by the way it dealt with McDonald and Singh pursuant to that article, the Board does not find the employer's conduct in evidence here to constitute a violation of sections 66 and 70 of the *Labour Relations Act*.

25. The complaint is hereby dismissed.

DECISION OF BOARD MEMBER L. LENKINSKI;

1. The evidence before the Board clearly discloses that the employer forewarned the union and the grieving employees that their acceptance of the jobs offered would discharge any obligation the employer had under the collective agreement, and resolve the grievances.

2. In my respectful view the employer's threat that Mr. McDonald and Mr. Singh, the employees in question, would lose their jobs should they choose not to drop the grievance, constitutes an undue interference with the employees' rights under the Act.

3. In paragraph 23 of the majority decision it is clearly stated that " ... any compromise settlement ... made conditional upon withdrawal of the grievance might come within the definition of an unfair labour practice." I agree with that.

4. I would have found on the basis of the evidence that the employer had placed an unacceptable condition on Mr. Singh and Mr. McDonald and thereby compelled them to waive their rights under the Act.

5. I would have found that the employer's conduct therefore violated sections 66 and 70 of the *Labour Relations Act*.

3166-85-R Energy and Chemical Workers Union, Applicant, v. **Petro-Canada Inc.**, Respondent, v. Group of Employees, Objectors

Certification - Petition - Parties agreeing that individual not managerial - Rebuttable presumption that individual cannot affect voluntariness of others' conduct - Employer free to adduce evidence that individual affected conduct of persons supporting or opposing union

BEFORE: Harry Freedman, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

APPEARANCES: Dan Ublansky and Glenn D. Buchanan for the applicant; Paul Jarvis and Wayne Taylor for the respondent; Claudio DiCamillo for the objectors.

DECISION OF THE BOARD; April 15, 1986

1. The name of the respondent is amended to read: "Petro-Canada Inc."
2. This is an application for certification in which the parties met with a Labour Relations Officer prior to the hearing in this matter in an attempt to resolve the issues raised in this application.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, that Board finds that all service station employees employed by the respondent at its Highway 400 service center at Cookstown, Ontario, save and except shift supervisors, persons above the rank of shift supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, hereinafter referred to as bargaining unit #1, and all service station employees employed by the respondent at its Highway 400 service center at Cookstown, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except the shift supervisors, persons above the rank of shift supervisor and persons working in restaurant and food services operations, hereinafter referred to as bargaining unit #2, constitute two units of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 and bargaining unit

#2, at the time the application was made, were members of the applicant on April 7, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. A timely statement of desire expressing opposition to the applicant was filed in this matter. If the Board finds that that statement of desire is a voluntary expression of the employees who signed it, the Board would ordinarily exercise its discretion to order a representation vote under section 7(2) of the Act notwithstanding that more than fifty five percent of the employees in each bargaining unit were members of the applicant at the relevant times, since a sufficient number of the employees who became members of the applicant later signed the statement of desire in opposition to the applicant. If the Board finds that the statement of desire is voluntary, it would cause the Board to doubt whether more than 55% of the employees in each of the two bargaining units who were members of the applicant continue to support the application for certification. A representation vote directed by the Board under section 7(2) of the Act is the process by which the Board resolves its doubt as to whether more than 55% of the employees who are members of the applicant continue to support the applicant's certification application that is caused by a timely voluntary statement of desire. Therefore, the Board commenced hearing evidence relating to the voluntariness of the statement of desire in opposition to the applicant.

7. The Board made the following oral ruling during the hearing of this matter on April 11, 1986:

During the course of the hearing in which evidence relating to the voluntariness of the statement of desire was being adduced, counsel for the applicant sought to cross-examine the representative of the group of objecting employees, Mr. Claudio DiCamillo, about his duties and responsibilities. Counsel for the applicant submitted that that evidence is relevant to the issue of voluntariness in that the employees' perception, assessed objectively, of Mr. DiCamillo's duties and responsibilities, caused the employees to sign the statement in opposition to the applicant out of concern that their employment may be adversely affected by their failure to sign, rather than out of a genuine change of heart about union representation.

Counsel for the respondent submits that the respondent originally took the position that Mr. DiCamillo was excluded from the bargaining unit on the grounds that he exercised managerial functions, but during discussions prior to the hearing with the Labour Relations Officer, agreed with the applicant that Mr. DiCamillo was an employee within the bargaining unit. Therefore, counsel for the respondent submits that the applicant cannot now argue that Mr. DiCamillo's duties and responsibilities are relevant to the issue of voluntariness of the statement in opposition to the applicant. Counsel also submits that if the applicant can take that position now, the respondent wishes to allege that another employee, employed in precisely the same job, with the same duties and responsibilities as Mr. DiCamillo, was the principal organizer of the applicant among the respondent's employees.

In our opinion, the agreement of the parties with respect to an employee being in the bargaining unit establishes that the employee does not exercise managerial functions and creates a rebuttable presumption that the employees's duties and responsibilities will not affect the voluntariness of the conduct of others responding to that employee's actions. Nevertheless, we are of the view that such an agreement does not preclude either party from eliciting evidence to establish that employees' perception of a person who circulated the statement in opposition to the applicant or who organized the employees for the applicant affected the voluntariness of the employees' conduct in either joining or opposing the applicant.

Therefore, the objection of the respondent is overruled. However, the respondent is free to adduce evidence as to the role played in the applicant's organizing campaign by the person who had the same duties and responsibilities as Mr. DiCamillo. Such evidence would be relevant, in our view, to the exercise of our discretion to order a representation vote since, if such an allegation is established, it may cause us to doubt whether the employees who joined the applicant did so voluntarily.

8. After delivering the above oral ruling, the Board noted, at the request of the applicant, that no argument was made with respect to the timeliness of the allegation that the respondent wished to make, having regard to Rule 72 of the Board's Rules of Procedure. The Board advised the parties that our oral ruling with respect to the respondent leading evidence on allegations that it wished to file was subject to any further argument that counsel for the applicant might wish to make based on Rule 72 of the Board's Rules of Procedure, and that the Board would deal with those submissions if and when the respondent attempts to adduce evidence with respect to the allegation referred to in the Board's oral ruling.

9. This matter is referred to the Registrar to be listed for hearing on May 16, 1986, before this panel of the Board.

3039-85-R; 3179-85-R Teamsters Chemical Energy & Allied Workers Union Local 424, Applicant, v. **Resco Chemicals & Colours Ltd.**, Respondent, v. Group of Employees, Objectors; Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited, Applicants, v. Teamsters Chemical Energy and Allied Workers Union, Local 424, Respondent

Bargaining Unit - Certification - Practice and Procedure - Board certifying production unit on agreement including quality control but excluding laboratory employees - Union subsequently seeking certification for unit of lab employees - Whether community of interest with production unit or with unorganized office employees - Whether separate unit for laboratory appropriate

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *B. L. Armstrong* and *W. H. Wightman*.

APPEARANCES: *David Watson* and *Bob Martin* for the union; *Joe Carrier*, *Walter Cannon* and *Walter Houston* for the employer; no one appearing for the objectors.

DECISION OF THE BOARD; April 23, 1986

I

1. This is an application for certification which was scheduled for hearing together with a related application under section 1(4) of the *Labour Relations Act*. Both came on for hearing before the Board on April 4, 1986. The parties were agreed and the Board hereby declares pursuant to section 1(4) of the *Labour Relations Act*, that Resco Chemicals & Colours Ltd. and Resco Distributing Company Limited are one employer for the purposes of the Act.

2. There is no dispute, and the Board finds, that Teamsters Chemical Energy and Allied Workers Union Local 424 is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. There is a dispute about whether the bargaining unit which the applicant seeks is appropriate for collective bargaining. In order to appreciate the parties' positions, it is necessary to sketch in some background.

II

3. The respondent employer is a manufacturer of colourants and has production facilities in Mississauga, Ontario. On January 28, 1986, the applicant union applied for certification as bargaining agent for what might be described as a "standard" production employee bargaining unit. (See Board File No. 2616-85-R.) That application, as initially framed by the union, would have included the five laboratory staff in the production bargaining unit, however, the employer objected. Eventually the parties agreed that quality control personnel would be included in the production bargaining unit, but the laboratory staff would be excluded. On the basis of that agreement both parties waived their right to a formal hearing

and, because the union had the requisite degree of support, the Board issued a certificate. The agreed bargaining unit is described as follows:

All employees of Resco Chemicals & Colours Ltd. in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales, clerical and laboratory staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

4. Counsel for the employer advised the Board that the employer had requested the exclusion of laboratory personnel because, in its view, those employees did not have a community of interest with production workers, and for collective bargaining purposes, technical or laboratory employees are usually grouped together with office workers - as, indeed, they often are. Counsel for the union explained that the union was agreeable to excluding laboratory personnel because, in the union's experience, they had been treated as a separate bargaining unit unto themselves. It is interesting to note that on the basis of the facts disclosed in the Board's decision in the earlier case, the union would have been certified without recourse to a representation vote *whether or not* the laboratory personnel had been included in the production bargaining unit. In other words, there is no basis for any suspicion that the union was "tailoring" its bargaining unit description to its distribution of membership support. The union was "certifiable" whether or not the laboratory staff were included in the production bargaining unit; and, had the union pressed its original claim, the Board would have issued an interim certificate and conducted an inquiry to determine whether the laboratory personnel should also be included in the bargaining unit. As it was, the union and the employer (for different reasons) reached agreement on their exclusion, and proposed to the Board a bargaining unit description which (superficially at least) reflects the one which the Board generally considers appropriate. Since the proposed unit reflected both the agreement of the parties and the Board's established practice, there was no need to inquire further. The union was certified to represent the employees in that unit.

5. On March 10, 1986, the union made the present application. It relates only to employees in the lab. The union asserts that they have a separate community of interest from *either* the production employees or the office, clerical and sales personnel. The employer asserts that their community of interest is with the office staff.

III

6. There are, potentially, five employees in the union's proposed bargaining unit. The parties are agreed that John Sheriff, the "lab manager", and A. Bajwa, a trained chemist, both exercise managerial responsibilities and would not, therefore, be part of the unit. The employee lists filed with this application suggest that there are approximately seven office, clerical or sales staff. There are about thirty-three employees in the plant bargaining unit.

7. The lab area is located on the ground floor of the employers' building, adjacent to the quality control area which, in turn, is adjacent to the production area. The lab and its equipment are physically separate from both production and quality control. The office is on the second floor of the building and can be reached from the lab by stairs. The lab employees enter the building by a door near the main punch clock. The office employees use a different entrance.

8. The lab employees use the same washrooms and changing area as the production workers. They have access to the production workers' lunchroom on the ground floor, but usually eat by themselves in the lab. The office workers have their own lunchroom and washrooms.

9. The lab employees are hourly rated and punch the time clock. The office employees are salaried and do not punch the time clock. Plant, lab and office employees all have similar benefits. Cheques are issued to the production workers by one corporate entity while paycheques to the office staff are issued in the name of the other (albeit related) company. The lab employees receive cheques in the same firm name (and thus from the same nominal employer) as the production workers. While the two companies are related for labour relations purposes, this arrangement nevertheless reflects a division in the respondents' administrative structure.

10. Lab employees have been called upon to work shifts to improve utilization of lab equipment, although currently there is only a day shift. The office employees do not work shifts. The hours of work, starting times, and break periods for the lab employees parallel those of the production workers. The hours of work for the office workers are different. Persons working in the lab wear lab smocks, as do the quality control personnel who are part of the production bargaining unit. This mode of dress is different from that of the office workers or the other employees in the production unit.

11. Although the lab personnel are described as "technicians", that title may be something of a misnomer. Sandra Cobb, a "lab technician - 3", advised the Board that she had no specific *technical* training, nor any post-secondary education of a technical nature. Her tasks are routine, mechanical, and do not require any specialized training. Obviously, the functions she performs are different from those performed by employees working in the plant or in the office, however, the skill content is not substantially different. She must prepare reports, complete forms, and each week spends one-half hour in the office typing a particular report (because there is no functioning typewriter in the lab). Those are not unlike the kinds of clerical functions performed by the office staff. On the other hand, the lab employees are sometimes concerned with "quality control" problems. The Board also was advised that weigh scales had been purchased for the production workers so that they could perform certain of their own tasks in the production area rather than using the scales in the lab. This suggests that some of Ms. Cobb's functions are quite similar to those performed by some production personnel.

12. Although the employer's total employee complement is relatively small, there seems to have been little employee movement from work area to another. There have been no transfers into the lab area, either from the production area or the office. No lab employee has been transferred or promoted to a position in production. Only one former lab employee has been transferred to a position in the office, where he became involved in production scheduling. When lab employees are absent or on vacation, these temporary vacancies are not filled by production or office personnel. Indeed, it is quite rare for either production employees or office workers to be in the lab area.

13. The source and rhythm of the lab employees' work is governed by the needs of both plant and office. Salesmen identify particular customer needs and the lab determines the

pigments and formulas necessary to meet the customers' specifications. This entails liaison with the office and sales staff for the purpose of reporting, costing, and to establish priorities. On the other hand, the lab staff also work in conjunction with plant personnel (at the supervisory level) if there are production problems or difficulties achieving the desired results from the formulas established in the lab. Quality control may identify the problem initially, but, then, as a company representative put it, "it's everybody's problem". Any problems with the end product are discussed at a weekly meeting which typically includes the production supervisor, the chemist, the lab manager, and an employee formerly with quality control who now acts as a "troubleshooter". Plant, lab, and senior management work together to resolve the difficulty; and if it is identified as a problem with the formula, the matter is referred to the chemist for reworking. Occasionally, the chemist, lab manager or lab staff initiate a "test run" in the production area after the initial work in the lab has been done, or where that appears to be the best way to resolve production problems.

14. The union maintains that its experience and Board practice both recognize that the laboratory can be a separate unit for collective bargaining purposes, but the evidence of such practice is less than overwhelming. At Leaver Detergents in Toronto, there are separate bargaining units and collective agreements for the 175 office staff, 475 production workers, and 35 employees in the lab; however, it is unclear whether that particular bargaining unit configuration was the product of separate Board certificates or collective bargaining. No such certificates were produced. In a case involving the applicant trade union and General Printing Inc., the Board issued an "office and clerical" certificate, *excluding* laboratory staff and persons covered by a subsisting collective agreement. This created, *de facto*, an unrepresented group of laboratory staff (and perhaps others), but the Board decision was based upon the agreement of the parties and was issued without a formal hearing into the appropriateness of the bargaining unit. In 1980, in a case involving Witco Chemical Canada Limited, Teamsters Local Union 132 was certified to represent a bargaining unit of "all employees working at Oakville, Ontario, save and except foremen, those above the rank of foreman, chemists, chemical technicians, research staff, office and sales staff". Three years later, without a hearing and on the agreement of the parties, the Board certified another bargaining unit at Oakville consisting of "all employees of [Witco], save and except foremen, those above the rank of foreman, office, clerical, and technical staff, sales staff, and those persons covered by a subsisting collective agreement". There is nothing inherently odd about the second certificate were it not for the existence of the first, which is not specifically dealt with in the Board decision. Nor is it apparent who this second "all employee" unit would apply to. It is certainly troubling to this panel of the Board (and may not have been apparent to the earlier panel) that the general wording of the second bargaining unit is misleading and encompasses only a small pocket of employees - a bargaining unit that the Board probably would not have considered appropriate if it had been described expressly. The background of a case twenty years ago involving *Falconbridge Nickel* is too cryptic to be very helpful in the present case. The only Board decision which deals expressly with the present problem is *B.F. Goodrich Canada Inc.*, [1982] OLRB Rep. Dec. 1797 to which we will refer in more detail below.

15. The employer submits that, on the evidence, the laboratory employees share a community of interest with the office staff. That was the basis for its earlier assertion that they should be excluded from the production bargaining unit (while quality control employees were included). The employer contends that apart altogether from community of interest considerations, to create a bargaining unit consisting solely of laboratory employees would unduly fragment the potential bargaining structure in a relatively small enterprise. There could

be six bargaining units defined in terms of the full-time or part-time employees in the "production", "office", and "lab" groupings. In the employer's submission, such fragmentation creates difficulties for the bargaining parties - particularly the employer - and in practice would be recognizing a bargaining unit limited to one specialized department.

16. The applicant union replies that the lab staff do not have a community of interest with the office workers and should not face the impediment of having to organize or bargain with an employee group with whom they do not have a community of interest. As things now stand, the office employees have indicated no appetite for collective bargaining, so the employer's concerns about fragmentation are entirely hypothetical; moreover, the applicant union contends, it is not obvious that the problems sometimes associated with fragmentation would arise here. To the extent that the lab group is independent of plant and office, jurisdictional disputes would not arise; and, to the extent that there is an affinity with the production group, the parties, in bargaining, can agree to deal with production and laboratory workers together because there is currently no collective agreement in place. The applicant union is quite prepared to merge the two groups and have them covered by a single collective agreement. Finally, the applicant union contends that the employer cannot be heard to complain about fragmentation when it was the employer which initially insisted on the exclusion of laboratory staff yet argued, in the present case, that if the Board should find the lab employees to constitute an appropriate unit, it should distinguish between full-time and part-time lab employees because there is some history of hiring part-time lab employees. That history was not spelled out very clearly but would result in a further division within the employee group.

IV

17. There are two Board cases which may help to put the present application into perspective: *B. F. Goodrich Canada Inc.*, *supra*; and *S. Gumpert Co. of Canada Ltd.*, [1985] OLRB Rep. Oct. 1523. In *Gumpert*, the union had made an application for a "plant production" bargaining unit and the Board had to decide whether an individual described as a "technician" should be part of that unit or part of a generic grouping of "office, clerical and technical" employees. The Board ultimately decided that she should be *excluded* from the production unit and, in passing, had this to say:

10. On an application for certification the Board must determine whether the bargaining unit applied for is "appropriate" for collective bargaining. There are few statutory guidelines for defining this concept, but what it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purposes of collective bargaining. In determining the appropriate bargaining unit, the Board considers such factors as: the community of interest of the employees; the practice or history of collective bargaining in the employer's enterprise and generally; the desirability of separating white-collar salaried and blue-collar hourly paid employees; the aversion to fragmentation of the bargaining unit; the employer's organizational structure; the nature of the work performed; the conditions of employment; the skills of employees; administrative or geographic circumstances; the functional coherence or interdependence of particular groups of employees; and so on (see generally: J. Sack, Q.C. and M. Mitchell, *Ontario Labour Relations Board Law and Practice*, Butterworths, Toronto, 1985 at pages 134ff and 163). In determining the appropriate bargaining unit, the Board seeks to group together employees with sufficiently coherent employment and collective bargaining interests that the collective bargaining process can be undertaken smoothly.

11. Early on in its history, the Board made certain broad generalizations which have become incorporated into collective bargaining practice and serve as guidelines for subsequent bargaining unit determinations. We need not detail those generalizations here (but again see *Sack and Mitchell, supra*). It suffices to say that one of those distinctions has been between “blue-collar” hourly rated, plant production personnel and “white-collar” salaried office, clerical, sales and technical staff. This is not to say that the clerk and the chemist or the typist and technologist perform the same functions or even share the same status at work. It is simply that these white-collar salaried staff are sufficiently different from the hourly rated blue-collar production and maintenance employees, that the latter form an identifiable and independently “appropriate bargaining unit”.

12. Quality control and plant clerical personnel lie somewhere in between. In some situations their terms of employment and conditions of work point to a community of interest with office, clerical and technical employees, while in other situations they are clearly associated or integrated with the blue-collar plant production employees. It is a question of the strength of their affinity, or, to put the matter another way, whether the “standard” production and maintenance unit would not be appropriate unless it included them. This, of course, turns upon the facts in each particular case.

In *Gumpert* the Board ultimately concluded that the “technician” had a community of interest with the office employees.

18. *Gumpert* illustrates the historical and practical foundations for the employee groupings which have come to be treated as “standard” or “generic” bargaining units. These groupings have been incorporated into the structure of collective bargaining, both through the actions of the Board and by parties negotiating collective agreements, and whatever their objective underpinnings, the parties continue to agree to them and they seem to work. They are familiar, acceptable and, therefore, appropriate, even though one might question whether distinctions so firmly rooted in the 1940’s and 1950’s should be applied to the complex job hierarchies in our emerging “post-industrial” society. Modern production methods have blurred the distinction between blue-collar manual workers and “technical” employees who at one time may have been more closely identified with the salaried staff working in the office. That was the problem faced by the Board in *Gumpert*.

19. *B. F. Goodrich* illustrates the Board’s response to a situation not of its own making where the bargaining parties had created a potential anomaly. There, the respondent employer had two plants and the parties had a long history of excluding quality assurance employees from the “production” unit, thereby treating them as if they were “office” rather than “production” employees. The quality assurance employees later sought to organize, and a question arose as to whether they would *by themselves*, constitute an appropriate bargaining unit. The employer took the position that they were not an appropriate bargaining unit because they should be grouped together with certain other clerical or technical personnel which had likewise been excluded from the established collective bargaining framework. The union asserted that they should have their own unit because they did not share a community of interest with office workers. The Board began its analysis as follows:

As a starting point, the Board notes that the parties at both plants, as indicated, have a long history of excluding quality assurance employees from the production unit, as if they were “office” rather than “production” employees, and this is a fact which must be considered. But the Board also recognizes that such historical developments on occasion are grounded more in chance than in fact; where, as here, the bargaining units were cast in the then-common terms of “hourly-rated employees”, quality assurance employees may have been accepted as

“office” simply because they were paid by the employer on a salaried basis at the time. In these circumstances, the Board could not find the history between the parties necessarily determinative of the issue, at least where an examination of the facts demonstrates clearly that the individuals in question, in spite of the bargaining history, maintain a community of interest with the “production” rather than an “office” bargaining unit.

The Board found, on the facts, that the quality assurance personnel did not have a close affinity with the office and clerical employees and further that none of the other workers excluded from the bargaining unit “share the kind of close community of interest and integration of work function with the production workers which the quality assurance employees demonstrate”. The Board concluded:

With respect to the present application, the Board finds that the applicant’s organization of a separate, self-contained unit of quality assurance employees as a tag-end to the plant is consistent with the respondent’s existing organizational structure, and will not create any undue hardship to the respondent in the way it has been carrying on its business. The creation of a bargaining unit does not normally interfere with job promotion out of that unit, and the existing inter-job training does not appear to be on a scale which will be significantly affected by this certification. The Board is mindful of the principles set forth in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, with respect to the appropriateness of a bargaining unit, and for all of the reasons given can find in this case no basis for requiring the applicant to expand beyond the quality assurance unit which it has already organized.

20. In our view, the situation in the instant case is very similar to that in *B. F. Goodrich*. Although the individuals whom the union seeks to represent work in an area described as a “laboratory” and have “technical” job titles, they have no formal “technical” training, they do not perform functions requiring any significant degree of skill or sophistication, and, most important, the employer has treated them more like its hourly-rated production workers rather than its salaried office and clerical staff. Their skills, payment method, hours of work, and the physical layout of the building all suggest a closer affinity with the production employees. They appear on the same payroll as those production employees, while the office staff have a different nominal employer. Even the focus and rhythm of their work seems more closely related to the production process - although no doubt in this regard there must be a continuing liaison with sales staff as well. On balance, then, we conclude that the laboratory employees have a significantly stronger community of interest with the organized production workers than the office and clerical employees. If the facts before us had been before the earlier panel of the Board, we are quite confident that the laboratory staff (like the quality control personnel) would most likely have been included in the “production” bargaining unit.

21. Of course, there was no intentional misrepresentation or intent to mislead the Board in the earlier case. We are satisfied that when the employer sought the exclusion of laboratory staff it was acting in good faith upon its own understanding of Board practice and their community of interest. The fact remains, however, that a group of employees who should probably be part of the “production” bargaining unit have, unintentionally, been left out. The question then becomes what should the Board do: sanction a bargaining unit which would not ordinarily be considered appropriate by itself or, alternatively, require the laboratory employees to bargain together with the office and sales staff with whom they have no strong community of interest and who, to date, have given no indication of any interest in collective bargaining. The first option leads to fragmentation of the bargaining structure, which can sometimes lead to collective bargaining problems (in this regard see *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, and *Bestview Holdings*

Limited, [1983] OLRB Rep. Aug. 1250). The second option would result in a dismissal of this application for certification because, although the laboratory employees have indicated an interest in collective bargaining, the office staff have not. (We should note, parenthetically, that there might also be a problem if the lab staff were numerous enough and the union's support strong enough that a certificate would issue even if the office employees were "swept in" to a generic office, clerical and technical bargaining unit. The unit might then include employees with divergent collective bargaining interests.)

22. We have considered the alternatives and the parties' representations and have concluded that the better balance is struck by our adopting the approach taken by the Board in *B. F. Goodrich* - although we do *not* adopt its terminology. A "tag-end" unit is a unit of unrepresented employees who, for one reason or another, have been excluded from the standard or generic bargaining units in place in an employer's enterprise. A "tag-end unit", as the name suggests, is ordinarily the last bargaining unit, encompassing all unrepresented employees and fashioned in terms which will ensure no further fragmentation of the bargaining structure. There is only *one* "tag-end unit". There is not a "tag-end" unit corresponding to each existing bargaining unit. By its very terms, a tag-end unit may include a diverse grouping of employees with no strong community of interest with each other. The suggestion that there can be a "tag-end" to each of the generic or existing bargaining units would double the number of potential bargaining units in any enterprise and raise the very spectre of fragmentation that the notion of a "tag-end" was designed to avoid. We repeat: there can be only one tag-end unit.

23. Having regard to the unusual circumstances of this case, we are prepared to accede to the union's request and find appropriate a unit of employees encompassing laboratory staff, but in order to avoid the potential for undue fragmentation of the bargaining structure, we think it should be framed in "tag-end terms". We are not persuaded that a bargaining unit framed in this way would create any serious collective bargaining problems for the employer and it will leave open to the office staff a coherent generic bargaining unit should they wish to engage in collective bargaining some time in the future. Finally, we should note that the union and the employer are currently engaged in collective bargaining for a collective agreement to cover the plant unit. There is no collective agreement yet in place so that any problems arising from the unfortunate (if inadvertent) exclusion of laboratory staff from the production unit can be addressed at the bargaining table.

24. For the foregoing reasons, the Board finds that the appropriate bargaining unit should be framed as follows:

All employees of Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, and persons for whom any trade union held bargaining rights on the date hereof.

25. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 21, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. We should note that no one appeared on behalf of certain

employees who filed a written statement opposing the union's certification. Since the Board was not presented with evidence of the kind contemplated by Rule 73 and paragraph 7 of Form 6, Notice to Employees, the Board is not disposed to give that employee statement any weight.

2378-85-U United Food and Commercial Workers International Union, Local 1105-P, Complainant, v. **Saville Food Products, Inc.**, Respondent

Duty to Bargain in Good Faith - Unfair Labour Practice - Board finding parties reached agreement on retroactive effective date of collective agreement - Employer reneging on effective date after contract ratified bargaining in bad faith

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *I. M. Stamp* and *W. F. Rutherford*.

APPEARANCES: *Susan Ballentine* and *Don Dayman* for the complainant; *Jack Kazdan* for the respondent.

DECISION OF THE BOARD; April 7, 1986

1. This is a complaint alleging that the respondent employer has violated sections 15, 50 and 64 of the *Labour Relations Act*.

2. At the commencement of the hearing scheduled in this matter the representative of the respondent requested an adjournment, in order to obtain the assistance of legal counsel. The respondent did not deny having received approximately one and a half months' notice of this hearing, nor did the respondent suggest why it was unable to retain counsel prior to the hearing date. After entertaining the submissions of the parties with respect to the adjournment, the Board denied the request. As noted, ample notice had been provided and no reason for the late request for the adjournment had been offered.

3. Although the complainant pleads and relies on the three sections of the *Labour Relations Act* set out in paragraph 1, the evidence and submissions made clear that a violation of section 15 and the duty to bargain in good faith is the essential matter at issue in these proceedings. Section 15 of the Act states as follows:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

4. The parties were in agreement as to many of the facts. The parties had commenced meeting with a view to negotiating a new collective agreement in June of 1985. By the time of the meeting held on September 3, 1985, the parties were agreed that the term of the

collective agreement would be one year, while remaining in disagreement as to when this one-year period would commence. The union's position was that the one-year term of the collective agreement was to be retroactive to August 15, 1985 and to run until August 14, 1986. The employer's position was that the one-year term was to commence as of the date of ratification. The Board was called upon to decide whether agreement had subsequently been reached on this point.

5. A meeting was held on September 20, 1985 with the assistance of a mediator from the Ministry of Labour. The parties were unable to resolve all matters as a result of the September 20th meeting and a strike began on September 23, 1985. During the strike various meetings continued to be held between the parties, with the final meeting occurring on October 22, 1985. At a meeting of the employees held on October 24, 1985 the employees purported to ratify the collective agreement.

6. The employer agrees that the proposal placed before the employees at the ratification meeting on October 24, 1985 was correct in all respects except for the subject matter of this complaint; that is, the employer continues to maintain that the one-year term of the agreement was to be effective from the date of ratification and to run for one year thereafter. The employer does acknowledge that, notwithstanding this effective date, the parties had agreed that the new wage rates were to be retroactive to August 15, 1985 and the employer has in fact been paying such rates retroactive to that date.

7. The union alleges that the effective date of commencement of the collective agreement had been agreed to by the parties by the September 20, 1985 meeting with the mediator, and that no further discussions as to the effective commencement date took place subsequent to that meeting. The union alleges that the employer sought to withdraw from this agreement only upon being advised that the employees had ratified the collective agreement (including the effective commencement date of August 15, 1985), subsequent to the ratification meeting of October 24, 1985. The union submits that it is bargaining in bad faith and a violation of section 15 for the employer, subsequent to the ratification vote and notification of the results of that vote, to seek for the first time to resile from its prior agreement as to the effective commencement date. The employer maintains simply that the effective date had never been agreed to throughout the course of negotiations.

8. The only witness for the union was Mr. Don Dayman, the Business Representative with the applicant and responsible for negotiating the collective agreement in question. In direct examination Mr. Dayman was asked if he was familiar with the statements contained in Appendix A of the complaint. Appendix A of the complaint reads as follows:

1. The Complainant union gave notice to bargain a renewal collective agreement to the Respondent on May 14, 1985.

2. Subsequent to this notice, the parties met on at least one occasion, but were unsuccessful in concluding a collective agreement. The Complainant then applied for conciliation and the parties met with the conciliation officer on several occasions. They were still unable to conclude a collective agreement.

3. The predecessor agreement expired on August 15, 1985. A no-board report was issued by the conciliation officer and was subsequently received by the Complainant on August 15, 1985.

4. The parties met on September 3, 1985. At that point, Jack Kazdan, on behalf of

the respondent, proposed a wage increase that would come into effect upon the ratification date. Mr. Don Daymon, on behalf of the Complainant, refused the offer - both in respect of the amount of the increase and in respect of the date the Respondent proposed to put it into effect. Both parties were agreed that the agreement would be in effect for one year.

5. The parties met with the assistance of a mediator on Sept 20, 1985. At that point, the parties agreed that the agreement would be retroactive to August 15, 1985. In particular, it was agreed that wages would be retroactive to that time although the actual amount of the wages was not yet agreed upon.

6. The Complainant went on strike on September 23, 1985.

7. The parties met again on October 3, October 15 and October 22, 1985. The Respondent's wage offer improved and the total package was accepted by the membership of the Complainant at a meeting held on October 24, 1985. The duration clause was not discussed since it had been agreed at the meeting on September 3, 1985 that the agreement would be retroactive to August 15, 1985 (when the previous agreement expired), and would last for a period of one year.

8. Mr. Daymon prepared a collective agreement incorporating the amendments the parties had agreed upon, and took it in to Mr. Kazdan for his signature. Mr. Kazdan refused to sign the agreement unless the duration clause was amended to provide that the agreement would run for a period of one year from the date of ratification.

9. This dispute is the only obstacle to the signing of the collective agreement.

10. The Complainant's position is that by changing its position on the duration clause at the last minute, the Respondent is not bargaining in good faith, and is not making every reasonable effort to conclude a collective agreement. It is the Complainant's position that this conduct violates sections 15, 50 and 64 of the Act.

After reviewing the contents of Appendix A as set out immediately above, Mr. Dayman was asked if the facts contained therein were accurate and he responded yes. In cross-examination, Mr. Dayman testified that the term and effective commencement date had been agreed to between the parties, and at the meeting on September 20, 1985 Mr. Dayman had advised the mediator of this and that the agreement would expire on August 15, 1986. The employer's representative, Mr. Kazdan, was present in the room when Mr. Dayman made this statement to the mediator. No further evidence was called by the union.

9. Mr. Kazdan was the only witness for the respondent employer. Contrary to Mr. Dayman's evidence, Mr. Kazdan testified that there had been no agreement on the effective commencement date prior to the September 20, 1985 meeting and indeed it had not been agreed to at that meeting either. Mr. Kazdan further testified that at the subsequent meeting on October 3, 1985 the parties were still in disagreement as to the effective commencement date but either at that meeting or at a subsequent meeting later in October the union had agreed to the company's position that the effective date be from the date of ratification.

10. Having observed both Mr. Dayman and Mr. Kazdan testify, the Board accepts the evidence of Mr. Dayman where it conflicts in any respect with the testimony of Mr. Kazdan. Mr. Kazdan's testimony was riddled with inconsistencies. For example, in testifying about what occurred at the meeting on September 20th with the provincial mediator, Mr. Kazdan initially testified that he did not remember Mr. Dayman referring at all to when the collective agreement was to expire. He subsequently conceded that Mr. Dayman had stated what the expiry date of the agreement was to be, but that Mr. Kazan had thereupon remarked that he

could not agree with that position. In further cross-examination, Mr. Kazdan changed his testimony again and stated that he did not recall Mr. Dayman making any remarks about the expiry date. Later on, Mr. Kazdan again conceded that Mr. Dayman did state to the mediator the expiry date of August 15, 1986.

11. A second example of the inherent unreliability of Mr. Kazdan's testimony revolves around the events which occurred at the meeting on October 3, 1985. He initially testified that by the time of the meeting of October 3, the union had abandoned its position with respect to the effective commencement or expiry date of the collective agreement. When further questioned on the matter, Mr. Kazdan conceded that the union had not officially abandoned its position but rather nothing had been said about the expiry date at the October 3rd meeting. Further on in cross-examination, Mr. Kazdan again changed his testimony to state that the union had agreed on October 3rd that the agreement was to be effective from ratification. In support of his testimony with respect to the October 3rd meeting, Mr. Kazdan submitted notes which arose out of that meeting and were signed by both parties. Those notes consist of two pages, handwritten, indicating in the left column the union position and in the right column the company position. It is worth noting that although numerous items are listed as still in dispute between the parties, the document is silent as to the effective date of the commencement of the collective agreement. The document does however note that at the October 3, 1985 meeting the parties were still in disagreement as to the wage rates, while agreeing that the wage rates were to be retroactive to August 15, 1985. It is of course possible that an employer would agree that the increased wage rates would be effective at a time earlier than the effective date of the collective agreement. However, the document setting out the positions of both parties, as of October 3, 1985, makes no mention of the continuing disagreement over the effective commencement date of the agreement. When these factors are taken together, the more logical inference to be drawn from the document is that the effective commencement date of the collective agreement was in fact no longer in dispute, as was testified to by Mr. Dayman.

12. Based on all the evidence, the Board finds that the effective commencement date of the collective agreement was agreed to at the meeting held on September 20, 1985 and the collective agreement was to commence its one-year term as of August 15, 1985. The Board is not prepared to give any weight to the testimony of Mr. Kazan where he suggests that at the subsequent meeting on October 3, 1985, this matter was still very much in dispute.

13. In the result, the Board finds that the parties had reached agreement on September 20, 1985 and that there had been no further discussions whatsoever nor any indication from the employer that it could no longer agree to the effective commencement date, prior to the ratification of the collective agreement by the employees on October 24, 1985, and the union so notifying the employer. When the respondent was presented with the collective agreement ratified by the employees, it was bargaining in bad faith and a violation of section 15 of the Act for the respondent to refuse to execute the agreement for the reasons stated, that the employer had never agreed that the collective agreement was to run from August 15, 1985 to August 14, 1986. In this regard the Board adopts the principles set out in *Sparton of Canada Limited*, [1985] OLRB Rep. Sept. 1420. The union, on the strength of the agreement obtained at the meeting of September 20, 1985 with respect to the effective commencement date of the agreement, and based on the agreements in all other respects subsequently reached between the parties, put that proposal to the membership and the membership subsequently confirmed their acceptance of that proposal by voting to ratify. The

respondent cannot now be permitted to renege on the position previously agreed to, without any indication to the union, prior to the ratification vote and notice of said ratification to the employer, that it was no longer willing to abide by that prior agreement. After the agreement reached on September 20, 1985 it was incumbent upon the respondent to notify the applicant if it was no longer prepared to be bound by that agreement.

14. The Board accordingly finds that the respondent has acted in violation of section 15 of the *Labour Relations Act* in refusing to ratify and execute the collective agreement as ratified by the complainant. The respondent is thus directed by the Board to enter into a collective agreement with the complainant, effective from August 15, 1985 to August 14, 1986 with all terms of that agreement to reflect the negotiated terms agreed to previously by the parties. No further relief is warranted as the complainant suggested that no additional forms of relief were appropriate in the circumstances.

15. The Board will remain seized of this matter in the event any dispute exists over the implementation of the order which the Board has made.

2208-85-U Andrew Smuk, Complainant, v. International Association of Machinists Local 1740 & Aerospace Workers, Respondent

Duty of Fair Representation - Unfair Labour Practice - Union filing policy grievance where agreement required individual grievance - Whether noncaring attitude - Failing to forward medical certificate to employer - Not untimeliness, when grievance of continuing nature - Violation found - Directing processing of grievance including arbitration

BEFORE: *Lita-Rose Betcherman*, Vice-Chairman.

APPEARANCES: *Andrew Smuk* on his own behalf; *George Drennan*, *Gary Zess*, *Art. Cook*, *George Young* and *Brian Sokolowski* for the respondent.

DECISION OF THE BOARD; April 17, 1986

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant, Andrew Smuk, alleges that he has been dealt with by the respondent union contrary to section 68 of the Act. Specifically, the complainant claims that the union did not process a timely grievance for him when the company allegedly failed to recall him in accordance with his seniority. The company was represented at the hearing by its Director of Human Resources, W. Gillis.

2. The complainant worked for this company and its predecessor companies for some 27 years. During his final period of employment his classification was that of Cleaner Sweeper. In this capacity he was required to keep washrooms, showers, toilets and basins in clean and orderly condition; to sweep, mop and scrub fixtures and area as required; also to perform other light labouring work.

3. The chronology of events is very important in this case and I propose to set it out in order.
4. On July 2, 1984 the employees of the company went on strike.
5. On July 3rd, the complainant filed a claim with the Workers' Compensation Board (WCB) alleging that two days before the strike he suffered an injury on the job. His claim was rejected on January 14, 1985, and the complainant appealed the WCB ruling.
6. On January 10, 1985, approximately one week after the strike ended, the company recalled about 40% of its employees. The complainant was not among those recalled. His position was filled by another employee who had greater seniority. (The complainant disputed this but on the basis of their relative positions on the posted seniority list, which had been in existence for twelve years, the Board has no difficulty in finding that the other employee had more seniority than the complainant.)
7. Mr. Gillis testified that on February 22, 1985, he phoned the complainant notifying him that he would be recalled if he could supply a medical certificate that he was physically able to perform his duties. The Human Resources Director stated that he was aware of the complainant's WCB claim. That same day the complainant obtained a note from Peter M. Adams, M.D. stating that the complainant was "fit for modified duties not involving heavy lifting" (Exhibit 4(a)) which he delivered to the company's personnel department. Mr. Gillis testified that he found this note unclear.
8. On February 25, Mr. Gillis wrote a letter to Dr. Adams in which he stated that the company had recently recalled Mr. Smuk to an available position and he described in some detail the duties of the position (Exhibit 4(b)). These included lifting garbage cans, bending, stooping, shoveling. In the letter Dr. Adams was asked for his opinion on whether there was a likelihood of injury to the grievor if he performed these duties. The letter also stated that the company was prepared to pay for the doctor's opinion. A copy of this letter was sent to the union. The complainant picked up the letter and delivered it to the doctor. Apparently Dr. Adams refused to answer the letter, stating that his note of February 22nd constituted an adequate response.
9. Mr. Gillis gave uncontradicted testimony that he never received an answer to his letter and heard nothing more from the complainant. He then filled the position on a temporary basis with one Mr. Potter who was junior to the complainant.
10. At this point it appears that the company was taking the position that it was willing to recall the complainant provided that he supply a satisfactory medical certificate, that the complainant was demanding that the union do something on his behalf, and that the union's attitude was that the complainant's most expedient course of action was to obtain a satisfactory medical certificate and thereby regain his job. George Young, the union committeeman handling the matter, testified that the complainant did not want him to put in a grievance because it might jeopardize his WCB appeal. The complainant insists that he never let up on his demands that the union file a grievance for him. In cross-examination, however, he acknowledged that he had been on the union executive and was aware that in an individual grievance the onus was on the employee to file.

11. On March 7, 1985, the union filed a policy grievance alleging that the company had contravened the collective agreement by filling the grievor's position with Mr. Potter who had less seniority than the complainant. At a meeting between the company and the union on March 26, 1985, the company denied the grievance taking the position that the grievance should not have been treated as a policy grievance. According to Mr. Young, the company was right but "I was on a limb with Andy [the complainant] calling me every night so I was trying to get something moving."

12. On April 15, 1985, the union membership authorized the withdrawal of the policy grievance. George Drennan, International Representative who presented the case for the union, stated under oath that the membership "agreed with the committee that it would have to be an individual grievance." Minutes of the meeting, read into the record state that "Andrew Smuk must get release from the doctor so he can return to work." Mr. Drennan testified that after the meeting he advised the complainant to renew his efforts to get a medical certificate.

13. The complainant gave uncontradicted testimony that later in April he obtained a medical certificate stating that he could do "regular work" and that he gave this to the union. There is no doubt that the union never passed this medical certificate on to the company. At the hearing, Mr. Drennan asked the complainant why he had not given the certificate directly to the company and suggested that it was not the union's duty to do so. The complainant replied that Mr. Drennan had asked him to get the certificate and, moreover, he did not want to deal with Mr. Gillis himself.

14. On July 23, 1985, the union filed an individual grievance signed by the complainant. The company rejected the grievance on the ground that it was out of time, as per Article 8.04 of the agreement. At a meeting on August 19, 1985, over the strong objections of the complainant, the union membership authorized withdrawal of this grievance.

15. On July 31, 1985, the WCB heard the complainant's appeal of its original decision to refuse his claim. On August 6, 1985, the WCB rejected the appeal.

16. The complainant officially retired on September 1, 1985 at which time the company posted his position and subsequently filled it permanently.

17. The complainant argued that the union acted arbitrarily, discriminatorily and/or in bad faith by not filing a timely individual grievance. He suggested that the union took no interest in his concerns because his retirement was imminent. He argued that during his layoff there was work he could have done which was being performed by employees with less seniority. With respect to the policy grievance filed on March 7th, he dismissed it as "nonsense". He stated that when he finally forced the union to file an individual grievance it was too late.

18. The union's position is that it honestly believed that the complainant's best course of action was to obtain a satisfactory medical certificate. Moreover, the union denied that the claimant requested it to file an individual grievance at the time it filed the policy grievance. The union claimed that the complainant did not want a grievance filed because it might compromise his WCB claim. The union agreed that the complainant repeatedly requested it to take some action and that that was why the policy grievance was filed. It emphasized that

the complainant, who had been on the union executive, was well aware that he could have filled out a grievance form and that his failure to do so supported the union's claim that he really did not want to file an individual grievance.

19. In order for the complainant to succeed, he must establish on a balance of probabilities that the union acted in a manner that was "arbitrary, discriminatory or in bad faith." The Board has set out guidelines for judging these factors in numerous cases: for example see *Abdel Elejel*, [1985] OLRB Rep. June 841 at paragraphs 44 and 45:

In order to find arbitrariness, the Board would have to conclude that the Union failed to direct its mind to the merits of the complainant's grievance or failed to enquire into or act upon available evidence or conduct any meaningful investigation to obtain the information to justify its decision. Alternatively, arbitrariness could be established if the complainant could show that the Union acted on the basis of irrelevant factors or principles or displayed an attitude that was indifferent, capricious or non-caring towards the complainant. (See *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001.)

To show bad faith the complainant would have to establish hostility, ill will, dishonest dealing, an attempt to deceive or a refusal to process the grievance for sinister purposes. (See *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618.)

In order to show discrimination, the complainant would have to show that the union has acted differently on other occasions in a similar situation. The complainant did not attempt to prove that the union acted in a discriminatory manner. As a result, the Board is faced with deciding whether, on the basis of the above guidelines, the union acted in an arbitrary manner or in bad faith.

20. The Board finds that the union's belief that the best course of action for the complainant was to get a medical certificate was honestly arrived at. There is considerable logic to the union's position. If the medical certificate was satisfactory, the complainant would get his job. If the medical certificate proved to be unsatisfactory, the company would be justified in refusing to recall the complainant and any grievance would be unsuccessful. To this point, the Board finds nothing arbitrary or in bad faith in the union's conduct.

21. The Board has problems, however, with the union's filing of a policy grievance when it had to know that it was improper procedure. Article, 8.12 of the collective agreement explicitly states that a policy grievance "shall not be used by the Union to institute a grievance directly affecting an employee which such employee could himself institute or have instituted" and on the company's objection, the grievance was withdrawn. Mr. Young, the union official who filed the grievance, stated candidly that the company was right. Moreover, Mr. Drennan, the International Representative who services this local, testified that the union committee and membership agreed that it should have been an individual grievance.

22. The duty of fair representation does not require the union to file grievances in every instance where an employee has a complaint against the employer. See citations in Sack and Mitchell, *Ontario Labour Relations Board Law and Practice* (Toronto: 1985), p. 481. In this case, as discussed above, the union had reason to believe that a grievance was not the best course of action. However, in the Board's view, once the union filed a grievance, it had business to do so properly. Having regard to the fact that these were experienced trade union officials, the Board finds the improper processing of this grievance indicative of a non-caring attitude. The consequence of this improperly processed grievance was that time might have run out for filing a proper individual grievance.

23. The union's explanation for not filing an individual grievance instead of the policy grievance was that the complainant did not want to file for fear of compromising his WCB claim. Yet the chronology of events shows that the complainant did, in fact, sign an individual grievance in July 1985 *before* his appeal was heard and disposed of by the WCB. As well, statements made by union witnesses themselves tend to contradict the union's explanation. The local union president testified that the complainant was vocal in support of his grievance at each union meeting. The union relies on the fact that the grievor did not take the initiative and file a timely grievance himself; yet Mr. Drennan conceded that Mr. Young, the local committeeman, may have told him not to file. Although the complainant admitted that he could have initiated an individual grievance at any time, the Board finds that he believed he needed the union's co-operation. His phraseology is indicative of this belief. "I finally *forced* them to put in a grievance but it was too late."

24. The union did not deny the complainant's assertion that he gave union officials a medical note certifying him for "regular work" in late April. That being so, it is difficult to understand why the union did not pass on the certificate to the company. The union was his agent and, armed with his medical clearance, should have made an effort to get his job back for him. Such an effort may well have been successful since Mr. Gillis testified that he did not fill the complainant's job permanently until the latter's official retirement in September, 1985.

25. Finally, the processing of the individual grievance filed July 23, 1985, gives rise to a number of questions. In the first place, why was a grievance filed when the union was in possession of a medical note which might have lifted the only bar standing in the way of his recall? Secondly, the readiness with which the union withdrew the grievance on the company's objection that it was untimely suggests that the union may not have directed its mind to the merits of the grievance. While time limits are mandatory under this agreement, it is arguable that the complained-of matter could be considered a continuing grievance and thus not untimely. Nevertheless, the union processed the grievance no further than the first step. In his formal complaint to the Board, the complainant charged the union with a breach of section 68 for failing to take this grievance to the second stage of the grievance procedure. Having regard to the union's conduct of the complainant's cause over the preceding months, I find merit in his complaint.

26. Looking at the evidence in its entirety, I find on a balance of probabilities that the union displayed an attitude that was indifferent and non-caring towards the complainant. Accordingly, it did not fulfill its duty to fairly represent the complainant's interests, thus violating section 68 of the *Labour Relations Act*. Pursuant to section 89(4) of the Act, and notwithstanding the provisions of the collective agreement binding upon the parties hereto, the Board issues the following orders:

- (1) that the union forthwith refile Mr. Smuk's grievance of July 23, 1985, and process it through the grievance procedure. The Board further directs the company to receive and process the grievance without objection concerning its time limits or any other procedural deficiency arising from the delay;
- (2) that in the event that the grievance is not settled to Mr. Smuk's

satisfaction, the Board further directs that the grievance be processed to arbitration for a hearing on its merits;

- (3) that in the event that is Mr. Smuk awarded compensation, the Board retains jurisdiction to determine how much is directly attributable to the union's breach of section 68, which shall be paid by the union.

27. The Board remains seized of this complaint for the purpose of resolving any matter arising out of the implementation of the above order.

3013-85-R Toronto Typographical Union No. 91, Applicant, v. **Starways Distributors**, A Division of Harlequin Enterprises Limited, Respondent, v. The Southern Ontario Newspaper Guild, Local 87, Newspaper Guild, Intervener

Certification - Practice and Procedure - Second union filing application for certification by intervention before terminal date of first union's application - Whether affected employees entitled to notice of intervention application

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *Joe Herbert* and *Joe Bigeau* for the applicant; *Derek L. Rogers*, *T. Nigel Campbell* and *Gary Kapitan* for the respondent; *G. Charney*, *Gail Lem* and *Sherry Liang* for the intervener.

DECISION OF THE BOARD; April 23, 1986

1. The name of the respondent is amended to read: "Starways Distributors, A Division of Harlequin Enterprises Limited"
2. This is an application for certification.
3. The applicant filed its application on March 7, 1986, and pursuant to Rule 2 of the Board's Rules of Procedure the Registrar fixed a terminal date of March 20, 1986.
4. The intervener filed its own application for certification by the terminal date, and in accordance with the practice of the Board notice of that application was not served upon the employees. At the hearing the Board invited submissions on whether it was necessary, for reasons of fairness and natural justice, to serve employees with a notice of the intervener application.
5. In our view, as a general proposition, the mere fact that a second application has been filed, irrespective of whether the bargaining unit description contained therein is identical or different to the bargaining unit description in the applicant's application, is a matter of which

employees ought to be notified. Both applicant and intervener strenuously opposed such notification, as in their submission employee rights to participate were essentially limited to the right to file petitions in opposition to a union. The applicant and intervener suggested that a vote was likely in the circumstances of the instant application, thus rendering irrelevant any employee petition, as the result of any petition filed and subsequently found by the Board to be voluntary would only be to cause a vote to be held. As a vote was going to be held in any event, it was unnecessary to provide the employees an opportunity to so file petitions.

6. We cannot accept the limited participation rights of employees as suggested by the applicant and the intervener. As the Board stated in *Tektron Equipment Corporation*, [1983] OLRB Rep. Nov. 1932:

“10. The granting of an application for certification has a substantial effect on the rights and obligations of the individual employees in the bargaining unit for which the certificate is granted. An employee’s right to bargain individually with his or her employer, however real or illusory that right may be, is terminated if the applicant trade union is granted a certificate for a bargaining unit which includes that employee. The terms and conditions of his employment are thereafter subject to the influence of the trade union, which thereafter has the exclusive right to bargain with respect to his terms and conditions of employment and to establish with his employer a collective agreement by which he is bound by virtue of section 50 of the *Labour Relations Act*. The rules of natural justice require that persons so directly affected by quasi-judicial proceedings be given notice of those proceedings and an opportunity to make representations. Pursuant to the Board’s Rules of Practice, notice is given to affected employees of applications for certification (Forms 6, 7 and 78), as well as of applications to terminate bargaining rights (Form 19), applications to declare successor trade union status (Form 24) and applications under Sections 63 and 1(4) (Forms 28 and 33).

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13. Sufficiency of membership support is not the only issue with which the Board must deal in a certification application. The Board must also determine the composition of the appropriate bargaining unit and the employee status of persons alleged to be or not be in that unit. As the resolution of those issues can be determinative in individual cases of the effect of the certification application on employees, employees are equally entitled to make representations on those and, indeed, any other issues pertinent to the disposition of the applicant: *IlSCO of Canada Limited*, [1973] OLRB Rep. May 221. Examples of cases in which objectors’ representations have been entertained with respect to the bargaining unit include *Tamco Limited*, [1974] OLRB Rep. Nov. 764, *Mason Windows Limited*, [1981] OLRB Rep. March 302 and *Windsor Western Hospital Centre Inc.*, [1979] OLRB Rep. May 462. Indeed, in the last mentioned case the position taken by the objectors was at odds with the terms of an agreement between the applicant employer and the respondent union. The status of individual employees or their representatives to make representations with respect to issues other than membership support is not dependent on the timely filing of a statement of desire: *Jim Davidson Motors Ltd.* [1968] OLRB Rep. June 268; *Strathmere Lodge, Middlesex County Home for Aged*, [1973] OLRB Rep. Aug. 425 (and see *Lorain Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734 where a group of employees was granted status to intervene after a pre-hearing vote had been conducted, when applicant trade union had at that point invoked section 8 of the Act.) As the status of an employee or group of employees to make such representations is not dependant on having filed a statement of desire, their status for those purposes cannot be adversely affected by the fact that they have filed a statement of desire which is determined to be irrelevant in the sense described in paragraph 9 above.

14. While the interests of individual employees may often parallel those either of the employer or the union, that does not diminish the employees’ right to have notice of and participate in certification hearings. A concerned employee is not limited to offering himself or herself as a witness to one or other of the employer or union, in the hope that by doing

so his or her point of view will be represented. Indeed, this Board has made it plain that the employer has no standing as spokesman for its employees except with respect to a narrow range of issues: *Federated Building and Maintenance Co. Ltd.*, [1979] OLRB Rep. Oct. 974.

7. We adopt this reasoning. If employees are entitled to participate in issues raised in certification proceedings, they must equally be entitled to meaningful notice in order to decide whether they wish to so participate. The fact that a second application, by a different union, had been made is a material fact and one of which employees ought to have received notice.

8. Both applicant and intervener submitted, in the event the Board decided that notice of the intervener application be provided to employees, that it was unnecessary to extend the terminal date. In our view it is unnecessary to deal with this issue at this stage of the proceedings, particularly as no party to these proceedings was requesting that the terminal date be extended. Such an issue may become relevant should either the applicant or intervener at a later stage seek to be certified without a vote, but a resolution of that issue can more properly be dealt with at that time.

9. Accordingly, for the reasons set out above the Board directs that the Registrar forward the attached Notice to the employer and we further direct that the employer post several copies of the attached Notices in conspicuous places where they are most likely to come to the attention of all employees who may be affected by the application and intervener application. Those notices shall remain posted upon the employer's premises until the close of business on the 2nd day of May, 1986. The employer is further directed to complete and send to the Board immediately the Return of Posting (Form 74), which shall be attached to the notices forwarded to the employer.

10. This matter is referred to the Registrar.

11. This panel of the Board is not seized with this matter.

2451-85-M London and District Service Workers' Union, Local 220, (The "Union"), v. St. Mary's General Hospital (Kitchener), (The "Employer")

Employee - Employee Reference - Practice and Procedure - Prior agreement between parties as to employee status - Not bar to full officer examination into duties and responsibilities during renewal negotiations - *Westmount Hospital* followed

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members I. M. Stamp and B. L. Armstrong.

DECISION OF THE BOARD; April 4, 1986

1. By letter dated November 22, 1985, the union requested a determination of the employee status for some twelve individuals, pursuant to section 106(2) of the Act. Prior to and subsequent to that request, there have been discussions between the parties, including an arbitration hearing adjourned on consent before completion, concerning these individuals. The Board need not recount these matters in detail except to state that, apart from one individual (B. Weber) who is agreed to be in the relevant bargaining unit, the dispute has not been resolved. The Board notes that a second person challenged (J. Ginns) was terminated on November 8, 1985.

2. The collective agreement between the parties expiring June 1, 1984 concerning the "full-time" unit was filed with the Board. At the time of the application, the union indicated the parties were negotiating a renewal; the employer has not contested that assertion. Further, the union also represents a "part-time" unit.

3. On February 12, 1986, the Board appointed Mr. C. Robicheau, Labour Relations Officer, to inquire into the duties and responsibilities of the disputed individuals and the identity to their employer (if any). With respect to this latter aspect, there appears to be no dispute that the hospital is the employer; the issue is whether the persons are employees within the meaning of the Act and, if so, are they covered by the relevant collective agreements. For the reasons set out in *Northern Telecom*, [1983] OLRB Rep. July 1134, the Board determines the first issue and that determination may or may not be conclusive as to the second issue. If it is not, the dispute over the scope of the collective agreement is properly determined at arbitration.

4. It is appropriate to refer at this point to the following passage from *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572 at paragraph 4:

"... Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a 'question' exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. The Board will not, however, permit an application (other than one relating to changes in the duties and responsibilities) to be brought during the first set of

negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of the collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer in inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that the appointment should not be limited to 'changes', it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment."

5. The meeting with the Labour Relations Officer was adjourned pending determination by the Board of an issue raised by the employer as to whether the status of certain of the individuals and/or classifications in dispute had been determined by a prior agreement between the parties. The parties forwarded written submissions to the Board in this regard. It is not necessary to set out those submissions except to note that, *inter alia*, the employer requested a hearing to present evidence of the parties' intention as to the "exclusion" agreed to by the parties in regard to the bargaining units.

6. With respect to the employer's position that the union is precluded from requesting a determination pursuant to section 106(2) because of the "prior agreement", the Board does not agree. As is stated in the passage referred to above, the Board permits an examination of the duties and responsibilities (in contrast to "changes" in those duties and responsibilities) during negotiations for renewal of a collective agreement notwithstanding a prior agreement as to status. In view of the basis for the examinations, the employer's request to introduce evidence as to intention, as set out in paragraph 5 above, is refused as irrelevant to the matter to be determined. The Board also notes that the examinations, again on the reasoning in *Westmount, supra*, should not be limited as sought by the employer in items (16), (17) and (18) of its written submissions. Finally, given the foregoing ruling, the Board need not respond specifically to the arguments raised by the union in its submissions.

7. Accordingly, the Board hereby confirms its appointment of the Labour Relations Officer to inquire into the duties and responsibilities of the individuals noted in the union's request of November 22, 1985, except as regards B. Weber, whom the parties have agreed is in the bargaining unit, and J. Ginns, whose employment terminated on November 8, 1985.

2204-85-R Canadian Union of Public Employees, Applicant, v. The Toronto General Hospital, Respondent, v. Ontario Public Service Employees Union, Intervener

Bargaining Unit - Practice and Procedure - Employer seeking to exclude students from part-time unit - Board reviewing policy of keeping part-timers and students in same unit except upon agreement - Finding no grounds to depart from policy

BEFORE: *Paula Knopf*, Vice-Chairman, and Board Members *W. H. Wightman* and *L. Lenkinski*.

APPEARANCES: *C. M. Mitchell*, *C. Wilkey* and *H. O'Regan* for the applicant; *Wallace M. Kenny*, *J. Rundle*, *O. Gibson* and *H. Schoonover* for the respondent; no one appearing for the intervener.

DECISION OF PAULA KNOFF, VICE-CHAIRMAN, AND BOARD MEMBER L. LENKINSKI; April 10, 1986

1. This is an application for certification.
2. The parties first came before a differently constituted panel of this Board which certified the applicant under section 6(2) of the *Labour Relations Act* on January 8, 1986 for the following bargaining unit, pending final resolution of the composition of the bargaining unit:

all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, registered nursing assistants, paramedical personnel, office and clerical staff, supervisor, foreman and assistant chief engineer.

The interim certification left pending for final resolution the issue of whether students employed during the school vacation period ought also to be included in the bargaining unit. The applicant seeks their inclusion while the respondent submits that they ought to be excluded.

3. To facilitate the resolution of the question of the composition of the bargaining unit, the previous panel directed the parties to exchange "pleadings" and "productions" prior to the resumption of the hearing. In accordance with this direction, the parties exchanged statements of material facts and documentation in support of their positions. As a result of this exchange and the co-operation of counsel for the parties, the Board was presented with an agreed statement of the facts of the case. The professionalism and the competence of counsel in their preparation and presentation of the case were of great assistance to the Board in expediting the hearing process and focusing the issues of the case. The agreed facts are set out below.

4. The Hospital has a history of employing students during the school vacation period on job classifications which fall within the full-time bargaining unit represented by CUPE Local 2001. The part-time bargaining unit, now represented by CUPE, mirrors the classifications which are found in the full-time collective agreement.

5. While the parties are not in agreement over the exact figures which were supplied

and relied upon by the Hospital, the Union takes the position that the following figures are not relevant to the substantive issues and thus has refrained from entering into a challenge of their accuracy. The figures presented were that in 1985, a number of students (approximately 143) were hired for the summer for job classifications which fall within the CUPE Local 2000 full-time bargaining unit. A number of these students (approximately 64) were returning from the previous year. An indeterminate number of those students had been employed by the Hospital for three or more summers previously.

6. In 1984, approximately 153 students were hired to work during the school vacation period in CUPE job categories. Approximately 42 of those students were returning for a second year. Approximately 53 of these students had been employed during the summer months by the Hospital for at least two previous summers.

7. In 1983, approximately 179 students were employed during the school vacation period in CUPE job categories. Approximately 41 of those were returning for a second summer and approximately 46 had been employed by the Hospital for at least two previous summers.

8. In 1982, approximately 164 students were employed during the school vacation period.

9. Students hired during the summer to relieve are paid lower wages than those who regularly perform the jobs. Part-time employees employed in CUPE job categories are paid at the same rates negotiated between the Hospital and the Union for full-time employees in the appropriate job categories and their movement through the wage grids is consistent with the terms negotiated for full-time employees. But the students relieving in these jobs had, previous to the summer of 1985, been hired at 75% of the regular base wage rates paid to full-time or part-time employees in the appropriate job category. Returning students employed the previous summer would be employed at 85% of the base wage rate for the appropriate job category. If returning for three or more years, the students were paid at 95% of the base wage rate for the appropriate job category.

10. In the summer of 1985, all students hired were paid at 75% of the base wage rate for the appropriate category and the 10% increase in the second and third summer of such employment was discontinued. Persons rehired who had already received the 10% increase in previous years had their wage rate red-circled.

11. At all material times, students have been receiving the same benefits as the part-time unit of employees.

12. Regular part-time Hospital employees who are called upon to perform summer relief in their job classification are paid at their regular rate of pay and are not reduced to the appropriate summer student rates.

13. The Hospital admits that departments prefer to use students to fill in for relief purposes during the summer months, instead of regular part-time employees, due to the lower costs and minimal disruption to established schedules.

14. Some regular part-time employees who work throughout the year are students. In 1985, approximately 10% or more of the students who had been categorized as summer relief

were then considered regular part-time employees for the course of the year. Summer students who are not terminated at the end of the summer are transferred to temporary, part-time or full-time status and from that point onward are not considered or treated as summer students.

15. There are a number of collective agreements in the hospital sector which exclude summer students from service-related bargaining units. But clearly the vast majority of collective agreements in the hospital sector do include part-time employees and students employed during the school vacation period together. A series of representative collective agreements were filed with the Board as examples of each type of agreement. To the parties' and this panel's knowledge, there is no separate unit in existence in the province which consists solely of students employed during the school vacation period in the hospital sector.

The Positions of the Parties

16. Counsel for the Hospital conceded that the Board has established a general practice of including students employed during the school vacations together with part-time employees in one bargaining unit. However, counsel argued that the *Inter-City Bandag (Ontario) Limited* case, [1980] OLRB Rep. March 324, contains a recognition that the parties can agree to exclude the students from a part-time unit and thereby create an appropriate unit for collective bargaining. It was submitted that the Board ought not to fetter its discretion by refusing to consider the appropriateness of a unit of part-time employees without the summer students in the absence of an agreement of the parties.

17. Counsel for the Hospital further argued that the Board's concern over excluding summer students from a part-time unit is a result of a concern over fragmentation and preventing the students from forming a viable unit on their own. However, it was submitted that since approximately 150 students are hired per year into the Hospital, this creates a large enough group to create a viable entity to represent the interests of the group at the bargaining table. Further, it was argued that the preamble of the *Labour Relations Act* and section 3 stand for the principle that representation of employees should be performed by an agent which is "freely designated" by the party. In this situation, counsel for the Hospital pointed out that, given the time of the application, none of the students who were employed during the school vacation were present to indicate what their free choice would have been with regard to the certification of the Union. This was said to constitute a "disenfranchisement" of those employees which ought to be considered in an analysis of what would create an appropriate unit.

18. Counsel for the Hospital further argued that the existence of a number of collective agreements in the hospital sector which exclude students from the part-time units indicates a recognition that the interests of students and part-time employees may not coincide. It was said that there are different interests between the part-timers and the students because the students are concerned only with an accumulation of the maximum amount of money to further their education. On the other hand, the part-timers would be more concerned with work schedules and working conditions. Similarly, it was said that conflicts could arise between part-time employees who may want a smaller number of hours where students would want a maximum number of hours per week. It was also argued that there would be conflicts between the part-timers and the students with regard to the accumulation of seniority because students would

never be able to accumulate the kind of seniority that could compete with part-timers with regard to promotion, layoff or long-term benefits. It was also argued that there could be competition between part-time employees and students with regard to the same jobs for relief during the summer period. Thus, it was argued that the students would be better off bargaining as a separate bargaining unit. Finally, counsel for the Hospital argued that, given the nature of the health care sector and the fact that there can be no strikes or lockouts, the Board ought not to be concerned about the viability of a bargaining unit because the unit has recourse to resolution of bargaining issues through arbitration.

19. In support of its submissions, counsel for the Hospital relied on the following cases in addition to the one quoted above: *Plummer Memorial Hospital*, [1979] OLRB Rep. May 433, and *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330.

20. Counsel for the Union submitted that the Hospital's argument runs against the clear line of authorities of the Board which express concern about the viability of separating summer students from part-time employees. It was pointed out that the practice of including the two groups together has been recently commented upon with favour by the Board in *Elizabeth Fry Society of Ottawa*, [1985] OLRB Rep. July 1026. It was argued that the Hospital has not shown any compelling evidence to deviate from the established practice.

21. With regard to viability, it was submitted by counsel for the Union that the viability of a bargaining unit is not a matter of size but rather a matter of whether the students have a strong enough attachment to employment, given the short duration of the summer period, to establish a viable bargaining unit. Further, it was submitted that there was no evidence before the Board to establish that the part-time and summer students could not create a viable bargaining unit together or that there was any real evidence of conflict of interest between the groups. Even if there were internal conflicts, it was said that it is common for there to be different interests within a bargaining unit and that the Union's responsibility under section 68 of the *Labour Relations Act* to properly represent all employees could well deal with such conflicts. On the other hand, counsel for the Union argued that because there is a fifty per cent turnover in the number of summer students each year, the group constitutes a "very tenuous" group of employees that would not have effective access to collective bargaining if it was severed from the part-time unit. The fact that these employees are denied the right to strike or lockout but given access to arbitration to resolve bargaining unit issues was submitted to be an irrelevant consideration in the question of viability.

22. Finally, counsel for the Union cited two recent authorities of the Board in support of the appropriateness of grouping the two sets of employees together. *Westburne Industrial Enterprises Ltd.*, [1985] OLRB Rep. Jan. 130 and *Temspec Inc.*, [1985] OLRB Rep. May 756. Finally, *St. Raphael's Nursing Home*, [1977] OLRB Rep. Sept. 580 was said to stand for the proposition that part-time employees and students share a community of interest and that no evidence before this Board should compel a finding that the students employed at this hospital during the school vacations do not share a similar community of interest with the part-time employees represented by CUPE.

The Decision

23. It is clear that the Board has an established practice of grouping part-time employees

together with students employed during the school vacation period in the same bargaining unit. The practice was first clearly enunciated in the *Plummer Memorial Hospital* case, [1979] OLRB Rep. May 433 where the Board said:

... Where students employed during the school vacation period are excluded from a bargaining unit of full-time employees and an application for part-time employees is filed it is the practice of the Board to include both the part-time employees and the students employed during the school vacation period in the bargaining unit. The Board's practice is predicated upon its belief that students employed during the school vacation period could not form a viable bargaining unit standing alone and even if they could, the result would be to create an unduly fragmented situation. While the Board is receptive to agreements of the parties in respect of bargaining unit descriptions it will not accede to these arrangements where the result is to do violence to its policies. The Board is of the view that the agreement of the parties in this case to exclude students employed during the school vacation period from a unit of part-time employees would do fundamental violence to the policy of the Board in this regard...

Thus, even in the face of an agreement by the parties, the Board was reluctant to sever the two groups.

24. The position taken in the *Plummer Memorial Hospital* case, *supra* was relaxed somewhat in *Inter-City Bandag (Ontario) Limited, supra*, where the parties agreed to have separate units of summer students and part-time employees and the Board asked itself whether it could endorse such agreement. The Board concluded at paragraph 9:

It must be recalled that *Plummer* dealt with a part-time application. As can be seen, however, the Board's concerns expressed in *Plummer* over the availability for students of a viable bargaining structure (as well as the potential for fragmentation), have led the Board in subsequent instances to exclude from a full-time bargaining-unit description a non-existent category, i.e. part-time employees, contrary to its normal aversion to such a practice, and even to the agreement of the parties. Accordingly, the Board is of the view that its tandem principle relating to part-time employees and students ought to be less rigidly applied, and will do so both in dealing with full-time and with part-time applications. Where the parties are able to agree on the part-time/student question, whether it be to combine or sever the two groups (and whatever the employment history may be), the Board will, in the absence of special circumstances, accept that agreement.

But having reached that conclusion, the Board gave further advice and direction to the parties at paragraphs 10 and 11:

10. Where there is a history of hiring only one or the other of the two groups, the Board will tend, in the absence of agreement by the parties, to exclude the "existent", but not the "non-existent" group from a full-time unit. Where, however, a full-time unit excludes part-time employees and students, and an application is made for the part-time unit, the Board (again in the absence of agreement by the parties) will tend to keep the two categories combined, even though only one "exists", in order to avoid undue fragmentation.

11. Similarly, where both groups exist and there is no agreement between the parties, the Board will likely treat the two groups in tandem, having regard to the community of interest which often exists between the two, as well as the usual concern over fragmentation.

12. In the present case, therefore, the Board has no difficulty accepting the bargaining unit agreed upon by the parties to this application.

Thus, absent special circumstances, the Board will accept the agreement of the parties to sever the two groups. But, similarly, absent special circumstances, where there is a conflict, the

Board will include the two groups in one bargaining unit in order to avoid undue fragmentation and having regard to a perception that the two groups share a community of interest.

25. This policy has recently been affirmed by the Board in *Elizabeth Fry Society of Ottawa*, *supra* at paragraph at 24 where the Board concluded:

... Balancing concerns about fragmentation with those of community of interest, the Board, early in its history, decided that the standard “part-time” bargaining unit should consist of not only part-time employees, but also students employed during the school vacation period. The Board has sometimes deviated from that approach to accommodate the agreement of the parties in particular cases, but in general “part-timers” and “students” have been grouped together. And whatever the merits or origins of this practice, it is now well rooted in collective bargaining practice and much too late to suggest that this way of describing a bargaining unit is “inappropriate” - at least in the absence of compelling evidence to the contrary.

26. Similarly, the Board has recently affirmed that the “students” and “part-timers” share a community of interest in *Westburne Industrial Enterprises Ltd.*, *supra*. Dealing with the question of the appropriateness of including the two groups, the Board concluded:

... There is nothing in the status of “student employed during the school vacation period” which precludes a part-time employment relationship during the school year. Indeed, such a combination is not unusual and, further, supports the Board practice of placing “students employed during the school vacation period” in a standard bargaining unit with “part-time employees”....

27. Having reviewed the Board’s established policy and its recent reaffirmation of such policy, we must also say that we are in full agreement with counsel for the Hospital that such practices and policies must always be open to challenge and be capable of being examined fully in the light of each case and each new set of facts that are presented. Otherwise, the Board would be seen to be fettering its discretion and failing to exercise its jurisdiction to determine the appropriate bargaining unit in cases such as this. Thus, we have accepted the Hospital’s invitation to scrutinize the established policy of including summer students with part-time employees in one bargaining unit and have considered whether such a policy and practice should apply to this application.

28. In the case at hand, we have a proposed bargaining unit that would include summer students with part-time employees. The facts establish that, like in the *Westburne* case, the summer students can often have their status changed to part-time if their employment relationship continues after the school vacation period. Further, the two groups share the same benefits. On the other hand, it may well be imagined that there could be differing objectives in the collective bargaining process between the summer students and the part-timers, but that is only a matter of speculation at this stage. There is no evidence that any actual conflicts or differences exist. Further, no evidence suggests that the two groups would be in a position of irreconcilable conflict in this particular hospital. There is no evidence before us that convinces us that the Union’s statutory duty to represent the two groups could not be properly carried out.

29. Further, we are not convinced that the summer students could be considered as a viable unit for collective bargaining on their own. While their numbers are unusually large compared to other sectors of employees, the numbers alone are not sufficient to create an effective voice at the bargaining table. Even given the high rate of return of students in

subsequent summers, unless they are lucky or persuasive enough to negotiate their agreements during the course of the summer, it would be unrealistic to expect the unit to be available to instruct, negotiate or ratify terms of a collective agreement after the summer is concluded. This would put an unwarranted and inviable strain upon negotiations themselves and indicates the inappropriateness of such a unit in circumstances such as this.

30. For all these reasons, we have concluded that in this particular case, an appropriate unit for collective bargaining at the Toronto General Hospital would be a part-time unit represented by the Union which includes students employed during the school vacation period. Thus, the Board will issue a certificate to the applicant for the following unit of employees:

all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, registered nursing assistants, paramedical personnel, office and clerical staff, supervisor, foreman and assistant chief engineer.

For the purposes of clarity, the term 'paramedical' includes such classifications as occupational therapists, speech therapists, speech pathologists, physiotherapists, therapeutic and administrative dietitians, registered and non-registered pathological technologists, radiological technologists (radiography), radiological technologists (nuclear medicine), registered and non-registered respiratory technologists, registered and non-registered EEG, ECG and ophthalmology technicians, registered and non-registered ultrasound technologists, glaucoma technicians, ear, nose and throat technicians, cardiovascular technicians, electroencephalographists, electrical shock therapists, laboratory technicians, laboratory assistants, electronic technicians, psychometrists, pharmacists, pharmacy technicians, psychologists, remedial gymnasts, medical records librarians, social workers, child care workers, nutritionists, dental health educators and bio-medical technicians. The Board notes the agreement of the parties that "paramedical personnel" also includes psychometry technicians, chiropodists, parental instructors, audiologists, research assistants, dental assistants, perfusionists, clinical instructors, medical photographers, technical assistants, entrostomol therapists, respiratory therapists, hyperbaric controllers, hyperbaric attendants and health records administrators.

31. A formal certificate will now issue to the applicant.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. As argued by counsel for the respondent, and accepted by the majority of this panel, it is critical to the policy objective of "harmonious relations between employers and employees", as articulated in the preamble to the *Labour Relations Act*, that the Board not fetter its discretionary authority by applying its standard practices without regard for the merits of each case or without regard for the labour relations implications of the differences between the Hospital sector (publicly funded and subject to compulsory interest arbitration), and the construction industry, (frequent changes in the work sites and employers) and secondary manufacturing (for which, in large part, the scheme of the *Labour Relations Act* was designed).

2. Indeed, in some instances, such as police work, firefighting and the public service,

a recognition of the importance of the differences has prompted the Legislature to devise totally separate labour legislation for each activity or sector.

3. I find two branches of the argument advanced by counsel to be most persuasive, the first of which relates to the question of community of interest.

4. While we know that a percentage of the students employed during the 1985 vacation period subsequently became temporary, part-time or full-time employees of the Hospital, we do not know what percentage this represents of the total complement of part-time employees. Whatever the numbers of part-time employees who are not perchance students, I am inclined to accept that their interests are more likely to focus on work schedules which accommodate to other employment or to family circumstances, positioning themselves in line for appointment to full-time employment, or welfare and other fringe benefits.

5. By contrast the students employed during the school vacation period, while in some instances gaining value from the work experience, without exception would view work, however informative, as a means to an end of maximizing income in anticipation of the costs of schooling for the ensuing academic term. For these people any "benefit", whether in the form of welfare insurance or union membership, which serves to reduce take-home pay would be viewed in a negative light and hence in conflict with the aspirations of the part-timers.

6. This leads to the second branch of counsel's argument to wit: that the timing of this application effectively denies these prospective constituents of the bargaining unit sought by the applicant union any say as to whether they shall be represented by this or any other applicant.

7. We have evidence of several years' history of 150 or more students having been hired each summer. This very substantial accretion to the bargaining unit, which the majority find to have sufficient community of interest for collective bargaining, would seem to me grounds for deferring the decision until such time as their wishes could be given consideration. Failure to do so strikes me as a denial of natural justice and of the express guarantee that an agent will be "freely designated" by a majority of those it seeks to represent.

8. I am more inclined however to adopt the argument by counsel for the Union that student employees lack "a strong enough attachment to employment, *or a labour union* (my words), given the short duration of the summer period to establish a viable bargaining." (See paragraph 21 of the majority decision.) Indeed, the employment relationship is so transitory as to lead me to believe that the students would have no interest in establishing a bargaining unit, viable or otherwise.

9. Accordingly, as between a decision requiring the Union to apply for a unit inclusive of part-timers and students at a time when the bulk of the summer hirings had taken place or, if the membership evidence is sufficient, to order the deferral of a certification vote until such a time (precedent for which is to be found in unreported decision in Board File No. 1150-82-R, *Brenning Construction Limited*), and a decision to treat the two groups as separate units, I would have preferred the latter and I would have so found.

0853-85-M International Brotherhood of Electrical Workers, Local 353, Applicant, v. **The Municipality of Metropolitan Toronto**, Respondent, v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Intervener

Arbitration - Construction Industry - Practice and Procedure - Union not directly affected by arbitration proceeding seeking participation at hearing - Possible effect of Board award as precedent not reason to allow participation by stranger to proceedings

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

APPEARANCES: *B. Fishbein* and *Michael Lloyd* for the applicant; *H. A. Beresford*, *R. J. Atkinson* and *D. A. Brown* for the respondent; *R. A. Werry* for the Intervener; *J. J. Nyman* and *John Cartwright* for United Brotherhood of Carpenters and Joiners of America, Local 27.

DECISION OF THE BOARD; April 24, 1986

1. This is a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.
2. The grievance relates to an alleged violation of the provincial agreement between The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario. The applicant, International Brotherhood of Electrical Workers, Local 353 ("IBEW Local 353") is a trade union bound by the provincial agreement. The respondent, The Municipality of Metropolitan Toronto, ("Metropolitan Toronto") is also bound by the provincial agreement.
3. These proceedings arise out of a grievance filed by IBEW Local 353 against Metropolitan Toronto alleging that Metropolitan Toronto violated the provincial agreement by having certain construction work at two police stations performed by a company not party to a collective agreement with the union. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, which is the relevant designated employer bargaining agency, has intervened in the proceedings. As noted above, the Agency is one of the parties signatory to the provincial agreement. None of the other parties has challenged its right to intervene in these proceedings. The United Brotherhood of Carpenters and Joiners of America, Local 27 ("Carpenters Local 27") also seeks to intervene in the proceedings. Its right to do so, however, is challenged by Metropolitan Toronto.
4. Carpenters Local 27 acknowledges that it is not bound by the provisions of the agreement being grieved under. It contends, however, that because it has had a bargaining relationship with Metropolitan Toronto longer than any other construction trade union, it is in a unique position to offer insight into Metropolitan Toronto's past involvement in the construction industry, as well as the degree of control which Metropolitan Toronto exercises over construction work performed on its behalf. Accordingly, submits the Local, it should be given standing to participate in these proceedings. Carpenters Local 27 further contends that it should be given standing because the Board's decision in this case will affect its own bargaining relationship with Metropolitan Toronto.

5. Carpenters Local 27 is a stranger to the provincial agreement being grieved under. Its rights will not be directly affected by these proceedings. Accordingly, it has no legal right to participate in the proceedings. See: *Mosser v. Marsden* [1892] 1 Ch. 487 and *Napev Construction Limited* [1979] OLRB Rep. Sept. 886. The only issue is whether, as a matter of discretion, we should give Carpenters Local 27 some sort of standing to participate. We believe not. If members or officials of Carpenters Local 27 have information relevant to these proceedings, it is open to one of the other parties to call the individuals in question as witnesses. There is no need to add Carpenters Local 27 as a party for this purpose. As for the claim that Carpenters Local 27 will be affected by the Board's decision in these proceedings, in that the Local is not a party to the proceedings, it cannot as a matter of law be legally affected by the outcome. To the extent that the decision reached by the Board in this case might be considered as a precedent in future cases, to that extent it might be said that the decision in this case might affect Carpenters Local 27. However, it will presumably affect the Local in the same way as it will affect any other union or employer, including other municipalities, who find themselves involved in a similar fact situation. For the Board to accept concerns about the precedential value of a decision as a basis for granting status to strangers to the relevant collective agreement in a section 124 arbitration proceeding would mean opening this, and many other 124 proceedings, to any number of employers and trade unions who could claim such an interest. This would only serve to needlessly complicate proceedings and seriously undermine the speed and economy which section 124 was designed to achieve. In this regard, see: *Williams Contracting Ltd.*, [1980] OLRB Rep. Jan. 121.

6. Having regard to the foregoing, the Board is satisfied that Carpenters Local 27 has no legal right to participate in these proceedings and should not be given standing to participate.

7. This matter has been set down to continue on May 14 and 15, 1986. In that this panel has not heard any evidence with respect to the merits of the grievance, the panel is not seized of the matter.

2400-85-R Labourers' International Union of North America, Local 1059, Applicant,
v. Walloy Excavating Company Limited, Respondent

Certification - Construction Industry - Membership Evidence - Practice and Procedure
- Union seeking certification of employers employees in ICI sector - Employer's submission that
unit should be restricted to residential sector because employer principally operates in that sector
and its employees were employed in that sector on application date, rejected - Allegation that dollar
payment made conditionally not treated as non-pay - Board not conducting own investigation

BEFORE: Harry Freedman, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

APPEARANCES: L. A. Richmond and S. MacKinnon for the applicant; and S. C. Bernardo and H. Loyens for the respondent.

DECISION OF THE BOARD; April 8, 1986

1. The name of the respondent is amended to read: "Walloy Excavating Company Limited".
2. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*. The respondent is an employer within the meaning of section 117(c) of the Act. The applicant is a trade union within the meaning of section 117(f) of the Act and is an affiliated bargaining agent within the meaning of section 137(1)(a) of the Act.
3. Counsel for the respondent submitted that the appropriate bargaining unit should be limited to the residential sector of the construction industry because the respondent principally works in that sector and on the date of application, its employees were employed in that sector only. During the course of the hearing of this matter, the Board delivered the following oral ruling:

Counsel for the respondent submits that the appropriate bargaining unit in this case should be described as "all construction labourers in the employ of the respondent in the residential sector of the construction industry in OLRB Area #3 save and except non-working foreman and persons above the rank of non-working foreman".

The applicant is an affiliated bargaining agent. Its application states that it seeks to represent certain employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario and certain employees of the respondent in all other sectors of the construction industry in OLRB Area #3. This application is made by the applicant under section 144(1) of the *Labour Relations Act*.

In our opinion, an application for certification relates to the industrial, commercial and institutional sector of the construction industry

as contemplated by section 144(1) of the Act if an affiliated bargaining agent chooses to apply for certification in respect of that sector of the construction industry. (See the *Report of G. W. Adams, Special Counsel to the Minister*, April 1980.)

Therefore, the Board finds that the bargaining unit applied for by the applicant is the appropriate unit for collective bargaining pursuant to section 144(1) of the Act since it is an application for certification that relates to the industrial, commercial and institutional sector of the construction industry.

4. Having regard to the foregoing, the Board finds that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Following the Board's determination of the appropriate bargaining unit, the Board was advised that the applicant challenged several of the persons that the respondent had named as employees in the bargaining unit on the date of application. The employer filed a schedule "A" containing 21 names. The applicant took the position that the following persons were not employees in the bargaining unit:

Ken Avery
Andrew Davies
Fred Grimminck
Ted Shephard
Robert Whitbourn
Bill Babenko
Peter Vanderydt

6. The applicant submitted that all the persons listed above were not employees of the respondent on the date of application, and in the alternative, took the position that Messrs. Avery, Davies, Grimminck, Shephard and Whitbourn were not construction labourers, and that Messrs. Babenko and Vanderydt were either non-working foreman or persons above the rank of non-working foreman and therefore exercised managerial functions. The respondent took the position that all of the persons named on the schedule filed are employees within the bargaining unit. Having regard to the agreement of the parties, the Board hereby appoints a Labour Relations Officer to:

- a) conduct a check of the respondent's records for the purpose of determining whether the persons listed in paragraph 5 were employed by the respondent on the date of application;
- b) inquire into the duties and responsibilities of

Ken Avery

Andrew Davies
Fred Grimminck
Ted Shephard
Robert Whitbourn

for the purpose of determining whether they were construction labourers on the date of application; and

- c) inquire into the duties and responsibilities of Bill Babenko and Peter Vanderydt for the purpose of determining whether they exercised managerial functions on the date of application.

7. The respondent had filed allegations with respect to the membership evidence filed by the applicant. Counsel for the respondent alleged among other things that one employee was advised "... that if the union was unsuccessful in certifying Walloy [the union] would give the one dollar payment back to [the employee]". Counsel for the respondent submitted that the Board ought to treat that allegation in the same way that the Board treats non-pay or non-sign allegations. He argued that the Board should conduct its own inquiry with respect to that particular allegation. After receiving the submissions of the parties on respondent counsel's motion, the Board delivered the following oral ruling:

In our opinion, an allegation of conditional payment does not raise a question of whether the applicant has filed fraudulent membership evidence. That kind of allegation relates to how the membership evidence that accurately states the transaction between the employee and the applicant was obtained. Therefore, the membership evidence is not fraudulent or false. As such, it is not appropriate for the Board to conduct its own inquiry into the allegation of conditional payment. Rather, the party making such an allegation must prove it in the ordinary course.

8. The hearing with respect to the allegations made by the respondent in relation to the membership evidence filed by the applicant commenced on April 4, 1986 and shall continue before this panel of the Board on April 11, 1986 and May 9, 1986.

9. This panel of the Board is not seized with the determination of the list and composition of the bargaining unit as more particularly set out in paragraph 6 above.

10. This matter is referred to the Registrar.

CASE LISTINGS MARCH 1986

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1986

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1046-85-R: United Brotherhood of Carpenters and Joiners of America, General Workers Union, Local 1030, (Applicant) v. Morewood Industries Limited, (Respondent).

Unit: "all employees of the respondent in the Township of Winchester save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (160 employees in unit).

2286-85-R: Ontario Public School Teachers' Federation, (Applicant) v. Kent County Board of Education, (Respondent).

Unit: "all occasional teachers employed by the respondent, in its elementary panel, in the County of Kent, save and except employees in bargaining units for which any trade union held bargaining rights as of December 10, 1985, being the date of application." (153 employees in unit). (*Having regard to the agreement of the parties*).

2483-85-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Hull-Thomson Limited, (Respondent), Employee, (Objector).

Unit: "all office and clerical employees of the respondent at Windsor, Ontario, save and except managers, persons above the rank of manager, sales staff, secretary to the president and employees in bargaining units for which any trade union held bargaining rights as of January 9, 1986." (3 employees in unit). (*Having regard to the agreement of the parties*).

2509-85-R: The Canadian Union of Public Employees, (Applicant) v. Dufferin Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in the Town of Orangeville, save and except assistant supervisor, persons above the rank of assistant supervisor, office and clerical staff, persons employed pursuant to special government grants, programmes or projects, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (22 employees in unit). (*Having regard to the agreement of the parties*).

2531-85-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Matheson Engineering and Developments Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and

except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

2539-85-R: Canadian Union of Public Employees, (Applicant) v. Wentworth County Board of Education, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent in the Regional Municipality of Hamilton-Wentworth employed as teachers’ aides save and except superintendent of programmes, and persons above the rank of superintendent of programmes, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights on January 15, 1986.” (37 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*.)

2572-85-R: International Brotherhood of Painters and Allied Trades - Local 1819 - Glaziers, (Applicant) v. Walpat Glass & Aluminum Products Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all glaziers and glaziers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (16 employees in unit).

Unit #2: “all glaziers and glaziers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (16 employees in unit).

2573-85-R: Labourers’ International Union of North America, Local 493, (Applicant) v. Atlas Construction Inc., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (20 employees in unit). (*Clarity Note*).

Unit #2: “all construction labourers in the employ of the respondent within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (20 employees in unit). (*Clarity Note*).

2574-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Atlas Construction Inc., (Respondent) v. L.I.U.N.A. - Ontario Provincial District Council, (Intervener).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman.” (20 employees in unit).

Unit #2: “all employees of the respondent within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the

repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman.” (20 employees in unit).

2604-85-R: United Food and Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. Quinte Meat Products Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Village of Wellington save and except managers persons above the rank of manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (48 employees in unit). (*Having regard to the agreement of the parties*).

2615-85-R: Canadian Union of Public Employees, (Applicant) v. Georgina Township Public Library Board, (Respondent).

Unit #1: “all employees of the respondent, in the Township of Georgina, save and except the chief librarian, deputy chief librarian, secretary to the chief librarian, the Sutton Branch Library Head, the Pepperlaw Branch Library Head, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in the Township of Georgina regularly employed for not more than 24 hours per week, and students employed during the school vacation period, save and except the chief librarian, deputy librarian, secretary to the chief librarian, the Sutton Branch Library Head, and the Pepperlaw Branch Library Head.” (14 employees in unit). (*Having regard to the agreement of the parties*).

2617-85-R: Union of Bank Employees Local 2104 (Ontario) CLC, (Applicant) v. Heritage Credit Union Inc., (Respondent).

Unit: “all employees of the respondent in Chatham, Ontario at its branches located at 318 Merritt Avenue and 245 St. Clair Street, save and except assistant general managers, persons above the rank of assistant general manager, controller, administration officer and confidential secretary.” (8 employees in unit). (*Having regard to the agreement of the parties*).

2620-85-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. 60390 Manitoba Ltd. carrying on business as Teknol Construction Services and Teknol Construction Systems, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

2637-85-R: Service Employees Union Local 268, (Applicant) v. Plummer Memorial Public Hospital, (Respondent).

Unit: “all employees of the respondent in Sault Ste. Marie, Ontario, regularly employed for not more than twenty-four (24) hours per week as registered radiology technologists, registered laboratory technologists, laboratory technicians, laboratory assistants, dark room assistants, registered cardiology technologists, cardiology assistants, nuclear medical technologists, non-registered nuclear medical technologists, pharmacy aide, pharmacy assistant, occupational therapy aide, and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor,

professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, dietitians, chief laboratory technologist, chief electrocardiology technician, chief technician-nuclear medicine, chief radiology technician, charge laboratory technologists, chief instructors of laboratory and radiology, graduate physiotherapists, graduate occupational therapists, graduate inhalation therapists, and employees in bargaining units for which any trade union held bargaining rights as of January 28, 1986, that being the date of application.” (13 employees in unit). (*Having regard to the agreement of the parties*).

2640-85-R: Teamsters Local Union No. 141, (Applicant) v. Loeb Inc., (Respondent).

Unit: “all employees of the Respondent at its London Division at 900 and 1000 Clarke Sideroad employed for not more than twenty-four (24) hours per week, save and except foremen, persons above the rank of foreman, office and sales staff.” (10 employees in unit). (*Having regard to the agreement of the parties*).

2650-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Gould Paper Products Ltd., (Respondent) v. Employee, (Objector).

Unit #1: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #2: “all employees of the respondent at Point Edward, Ontario, save and except managers, persons above the rank of manager, warehouse manager, office, clerical and sales staff.” (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2651-85-R: Canadian Union of Public Employees, (Applicant) v. The Nipissing Board of Education, (Respondent).

Unit: “all employees of the respondent in Nipissing employed as teachers’ aides, save and except persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (4 employees in unit). (*Having regard to the agreement of the parties*).

2673-85-R: United Food and Commercial Workers Union, Local 409 Chartered by United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Valbay Hotel Limited, (Respondent).

Unit: “all employees of the respondent in Thunder Bay, save and except supervisors, persons above the rank of supervisor, banquet captains, inspectresses, hostess/cashiers, sales and office staff, front desk staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (118 employees in unit). (*Having regard to the agreement of the parties*).

2688-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Algoma Steel Club, (Respondent).

Unit: “all employees of the respondent in the City of Sault Ste. Marie, save and except manager, persons above the rank of manager, bar supervisor, chef, co-ordinator functions and secretary.” (24 employees in unit). (*Having regard to the agreement of the parties*).

2696-85-R: Ontario Nurses’ Association, (Applicant) v. Notre-Dame Hospital, (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in Hearst, save and except Associate Director of Nursing/Inservice Coordinator, persons above the rank of Associate Director of Nursing/Inservice Coordinator, Planning Discharge Referral and Staff Health officer and persons regularly employed for not more than twenty-four (24) hours per week.” (39 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent for not more than twenty-four (24) hours per week in Hearst, save and except Associate Director of Nursing/

Inservice Coordinator, persons above the rank of Associate Director of Nursing/Inservice Coordinator, and Planning Discharge Referral and Staff Health officer.” (5 employees in unit). (*Having regard to the agreement of the parties*).

2721-85-R: United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Canada Packers Inc., (Respondent).

Unit: “all employees of the respondent at its Canadian Vegetable Oil Division in the City of Hamilton, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of February 5, 1986.” (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2723-85-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Oliver, (Respondent).

Unit: “all employees of the respondent in the Township of Oliver, save and except supervisors, persons above the rank of supervisor, secretary/deputy clerk and persons regularly employed for not more than twenty-four (24) hours per week.” (4 employees in unit). (*Having regard to the agreement of the parties*).

2725-85-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Jaddco Anderson Limited, (Respondent) v. Labourers’ International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of its affiliated Local Union 837, (Intervener #1) v. International Union of Operating Engineers, Local 793, (Intervener #2).

Unit: “all employees of the respondent in Burlington, Ontario, save and except foremen, those above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of February 5, 1986.” (9 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2726-85-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Canadian Cabinets Company Limited, (Respondent).

Unit: “all employees of the respondent at Nepean, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, technical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (30 employees in unit). (*Having regard to the agreement of the parties*).

2729-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. 485000 Ontario Inc. o/a Pumpcrete, (Respondent).

Unit: “all employees of the respondent at Niagara Falls, save and except foremen, persons above the rank of foreman, office, clerical, sales and engineering staff and employees in bargaining units for which any trade union held bargaining rights as of February 6, 1986 being the date of application.” (6 employees in unit). (*Having regard to the agreement of the parties*).

2746-85-R: Canadian Paperworkers Union, (Applicant) v. Tencorr Packaging Inc., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (36 employees in unit). (*Having regard to the agreement of the parties*).

2747-85-R: Ontario Nurses' Association, (Applicant) v. Bruce Peninsula Health Services, (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the Respondent in Wiarton and Lions Head, save and except Nursing Unit Managers, Clinical Quality Assurance Co-ordinators, persons above the rank of Nursing Unit Manager and Clinical Quality Assurance Co-ordinator and Registered and graduate nurses employed in a nursing capacity for not more than twenty-four (24) hours per week." (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity for not more than twenty-four (24) hours per week by the Respondent in Wiarton and Lions Head, save and except Nursing Unit Managers, Clinical Quality Assurance Co-ordinators and persons above the rank of Nursing Unit Manager and Clinical Assurance Co-ordinator." (16 employees in unit). (*Having regard to the agreement of the parties*).

2764-85-R: United Steelworkers of America, (Applicant) v. Accuflex Industrial Hose Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Guelph, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period." (50 employees in unit). (*Having regard to the agreement of the parties*).

2772-85-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. BASS, a Division of Polycom Systems Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto and the City of Mississauga, save and except supervisors, those above the rank of supervisor, office and sales staff, and persons regularly employed at the O'Keefe Centre." (77 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2774-85-R: United Steelworkers of America, (Applicant) v. Isolation Systems Limited, (Respondent).

Unit: "all employees of the respondent in its Medical Products Division in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

2787-85-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Nike Canada Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, clerical, office and sales staff." (11 employees in unit). (*Having regard to the agreement of the parties*).

2798-85-R: Energy and Chemical Workers Union, (Applicant) v. Petro-Canada Inc., (Respondent).

Unit #1: "all service station employees of the respondent at its Highway 401 Northside and Southside Service Centres at Cambridge, Ontario save and except shift supervisors, persons above the rank of shift supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (36 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all service station employees of the respondent at its Highway 401 Northside and Southside Service Centres at Cambridge, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except shift supervisors, persons above the rank of shift supervisor and persons working in restaurant and food services operations." (36 employees in unit). (*Having regard to the agreement of the parties*).

2799-85-R: United Food and Commercial Workers Union, Local 409 chartered by United Food & Commercial Workers International Union CLC-AFL-CIO, (Applicant) v. Oshawa Holdings Ltd., (Respondent).

Unit #1: “all employees of the respondent in The Codville Company, A Division of Oshawa Holdings Ltd., carrying on business as Fort Frances I.G.A., in the Township of Fort Frances, save and except Meat Department Manager, Produce Manager, Assistant Manager, persons above the rank of Meat Department Manager, Produce Manager and Assistant Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (19 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in The Codville Company, A Division of Oshawa Holdings Ltd., carrying on business as Fort Frances I.G.A., in the Township of Fort Frances, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Meat Department Manager, Produce Manager, Assistant Manager and persons above the rank of Meat Department Manager, Produce Manager and Assistant Manager.” (19 employees in unit). (*Having regard to the agreement of the parties*).

2827-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Beaver Lumber Company Limited, (Respondent).

Unit #1: “all employees of the respondent at Gloucester, save and except department managers, persons above the rank of department manager, head cashier, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (31 employees in unit). (*Having regard to the agreement of the parties*) (*Clarity Note*).

Unit #2: “all employees of the respondent at Gloucester regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department manager, head cashier, office and clerical staff.” (65 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2830-85-R: Iron Workers District Council of Ontario, (Applicant) v. A. G. Baird Limited, (Respondent) v. Ontario Sheet Metal Workers’ Conference and Sheet Metal Workers’ International Association, Local 30, (Intervener).

Unit #1: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (21 employees in unit).

Unit #2: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (21 employees in unit).

2859-85-R: Energy and Chemical Workers Union, (Applicant) v. Sterling Drug Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Aurora, Ontario, save and except foremen, foreladies, supervisors, persons above the rank of foreman, forelady and supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of February 19, 1986.” (45 employees in unit). (*Having regard to the agreement of the parties*).

2862-85-R: Service Employees Union, Local 478, (Applicant) v. Kirkland and District Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in Kirkland Lake regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except secretary to the administrator, secretary to the assistant administrator, secretary to the director of nursing, secretary to the director of personnel, supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of February 18, 1986." (8 employees in unit). (*Having regard to the agreement of the parties*).

2872-85-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Tedesco Water Proofing, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2873-85-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Don Bell Const. Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2894-85-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Bally Canada Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, employees working in customer service, display and retail outlets, office, clerical and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

2897-85-R: Canadian Paperworkers Union, (Applicant) v. Holt Rinehart and Winston of Canada Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office, clerical, and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2910-85-R: Labourers' International Union of North America, Local 527, (Applicant) v. Anthes Equipment Limited, (Respondent).

Unit: "all employees of the respondent at and out of Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four

(24) hours per week and students employed during the school vacation period.” (7 employees in unit).
(*Having regard to the agreement of the parties*).

2941-85-R: International Union of Bricklayers and Allied Craftsmen, Local 7 Canada, (Applicant) v. Reistar Masonry Ltd., (Respondent).

Unit #1: “all bricklayers and bricklayers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell and the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

2947-85-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Sebco Construction Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

2978-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Sebco Contracting Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

2995-85-R: Labourers’ International Union of North America Local 527, (Applicant) v. Y. D. Masonry Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial

and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3455-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Highbury Ford Sales Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in London, Ontario, save and except tower operator, managers, service advisors, foremen, persons above the rank of foremen, office and sales staff." (43 employees in unit).

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	39
Number of segregated ballots cast by persons whose name appear on voters' list	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	16

2539-85-R: Canadian Union of Public Employees, (Applicant) v. Wentworth County Board of Education, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

Unit #2: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth employed as teachers' aides for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the superintendent of programmes, persons above the rank of superintendent of programmes, and employees in bargaining units for which any trade union held bargaining rights on January 15, 1986." (37 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

Applications for Certification Dismissed - No Vote Conducted

2154-85-R: Ontario Public Service Employees Union, (Applicant) v. Huntsville District Memorial Hospital, (Respondent) v. Group of Employees, (Objectors). (15 employees in unit).

2600-85-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Eric Whalley Construction Ltd. 419600 Ontario Limited, (Respondent). (16 employees in unit).

2650-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Gould Paper Products Ltd., (Respondent) v. Employees, (Objector). (7 employees in unit).

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

2702-85-R: Labourers' International Union of North America, Local 493, (Applicant) v. Atlas Construction Inc., (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener #1), v. United Brotherhood of Carpenters and Joiners of America, Local 2486, (Intervener #2). (15 employees in unit).

2748-85-R: Ontario Nurses’ Association, (Applicant) v. Toronto General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener). (257employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2711-85-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Central Stampings Limited, (Respondent) v. Christian Labour Association of Canada, (Intervener) v. Group of Employees, (Objectors).

Unit: “all office staff of the employer pursuant to the certificate issued by the Ontario Labour Relations Board dated September 17, 1976, save and except office manager, persons above the rank of office manager, buyer, shipper-receiver, production control expeditor, management trainees, sales staff, time study observers, private secretaries, budget study analysts and students employed during the school vacation period. (15 employees in unit).

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	3
Ballots segregated and not counted	4

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2298-85-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. The Country Den Restaurant, (Respondent).

Unit: “all employees of the respondent at 117 Simpson Street, Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (8 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	8
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2684-84-R: Ontario Secondary School Teachers’ Federation, (Applicant) v. The Durham Board of Education, (Respondent).

1836-85-R: Ontario Nurses’ Association, (Applicant) v. St. Mary’s Hospital (London), (Respondent) v. E. J. Herechuk, Business Manager International Union of Operating Engineers Local 772, (Intervener).

2694-85-R: International Ladies’ Garment Workers’ Union, (Applicant) v. Ragona Fashions, (Respondent).

2844-85-R: International Ladies Garment Workers’ Union, (Applicant) v. G.S.E. Inc., carrying on business under the firm name and style as the Great Sewing Exchange, (Respondent).

2857-85-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Howard Johnson (East) Hotel, (Respondent).

2860-85-R: Local 269, Sheet Metal Worker's International Association, (Applicant) v. Ken Roloson Sheet Metal, (Respondent).

2929-85-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Intermodal Marine Surveys Ltd., (Respondent).

2933-85-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Simpsons Limited, (Respondent) v. Group of Employees, (Objectors).

2976-85-R: United Brotherhood of Carpenters and Joiners of America, Local Union 27, (Applicant) v. Colonial Homes, (Respondent).

2991-85-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. J.S.A. Construction Co. Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1481-83-R: Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd./Les Coffrages (C.C.C.) Ltee and Fix Fast Ltd./Ltee, (Respondents). (*Dismissed*).

0089-85-R: United Brotherhood of Carpenters and Joiners of America, Local 1259, (Applicant) v. Carpicorn Acoustics & Drywall Ltd. and J. & J. Drywall & Painting, A division of Silver Cloud Construction Limited, (Respondents). (*Dismissed*).

1641-85-R; 1642-85-R: Labourers' International Union of North America, (Applicant) v. J.D.S. Investments Limited and Westney heights Inc. and LROM Construction Limited, (Respondents). (*Withdrawn*).

2314-85-R: The United Food & Commercial Workers, Local 206 and United Food & Commercial Workers Local 486, (Applicants) v. The Oshawa Food Division of the Oshawa Group Limited, 629090 Ontario Limited, 629091 Ontario Limited, 629092 Ontario Limited, (Respondents). (*Withdrawn*).

2404-85-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Tornado Insulation Limited, Tornado Insulation Limited carrying on business as Belform Insulation and Belform Insulation Ltd., (Respondent). (*Withdrawn*).

2749-85-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Aldore Electric, Gemini Electric Company Limited, Linda Joffe c.o.b. as Electrix (1984) Company, 618830 Ontario Limited, c.o.b. as R.L.D. Electric, 618830 Ontario Limited, c.o.b. as Accord Electric and 618830 Ontario Limited, c.o.b. as Centreline Electric, (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

1351-85-R: The United Food & Commercial Workers, Local 206, and United Food & Commercial Workers Local 486, (Applicants) v. Canada Safeway Limited and The Oshawa Foods Division of the Oshawa Group Limited, (Respondents). (*Dismissed*).

1491-85-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 990, (Applicant) v. Kellough Bros. Dairy Limited and Klomp Wakefield Dairies A Division of Beatrice Foods (Ontario) Limited, (Respondent). (*Dismissed*).

1641-85-R; 1642-85-R: Labourers' International Union of North America, Local 183, (Applicant) v. J.D.S. Investments Limited and Westney Heights Inc. and LROM Construction Limited, (Respondents). (*Withdrawn*).

2404-85-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Tornado Insulation Limited, Tornado Insulation Limited carrying on business as Belform Insulation and Belform Insulation Ltd., (Respondent). (*Withdrawn*).

2749-85-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Aldore Electric, Gemini Electric Company Limited, Linda Joffe c.o.b. as Electrix (1984) Company, 618830 Ontario Limited, c.o.b. as R.L.D. Electric, 618830 Ontario Limited, c.o.b. as Accord Electric and 618830 Ontario Limited, c.o.b. as Centreline Electric, (Respondents). (*Withdrawn*).

CROWN TRANSFER ACT

0650-85-R: Ontario Public Service Employees Union, (Applicant) v. Daniel Dolan, Henry Wilson and The Crown in Right of Ontario, as represented by The Ministry of Natural Resources, (Respondents). (*Granted*).

2198-85-R: Canadian Union of Public Employees, Local 87, (Applicant) v. The Corporation of the City of Thunder Bay, The Ontario Public Service Employees Union and The Crown in Right of Ontario, (Respondents). (*Granted*).

UNION SUCCESSOR RIGHTS

1961-85-R: Office & Professional Employees International Union, (Applicant) v. Home Care Employees' Association, (Respondent). (*Granted*).

2719-85-R: Ontario Public Service Employees Union, (Applicant) v. York University Co-operative Day-care Centre, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2222-85-R: June Heels, (Applicant) v. United Food & Commercial Workers, Local 206, chartered by the United Food & Commercial Workers International Union, CLC, AFL-CIO, (Respondent).

Unit: "all employees of C & J Maurice Family Holdings Inc. (Mr. Grocer, Midland) employed at its stores in the Townships of Tiny and Tay including Midland, save and except the store manager, one grocery manager and one other department manager." (28 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		27
Number of persons who cast ballots	25	
Number of ballots marked in favour of respondent		6
Number of ballots marked against respondent		19

2310-85-R: Therese Laframboise and Yolande Pichette, (Applicants) v. Service Employees Union, Local 219, (Respondent) v. Domus Building Cleaning Co. Ltd., (Intervener). (65 employees in unit). (*Dismissed*).

2312-85-R: Janet Armstrong, (Applicant) v. Graphic Communications International Union Local 517, (Respondent). (2 employees in unit). (*Granted*).

2447-85-R: Margaret Cousens, Patricia Berdan, Gail Cronkwright, Jeremy Henderson, Richard McCollow, William A. McCollow, Carolyn Beech and John Louis, (Applicants), v. International Molders and Allied Workers Union, (Respondent). (10 employees in unit). (*Granted*).

2448-85-R: Cletus Timmons, (Applicant) v. Local 280 Bartenders & Beverage Dispensers of H.E.R.E. Int'l Union, (Respondent). (16 employees in unit). (*Dismissed*).

2558-85-R: David Bellinger, (Applicant) v. The United Brotherhood of Carpenters and Joiners of America and its Local 1030, (Respondent). (7 employees in unit). (*Granted*).

2559-85-R: Mabel Coulter, (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75, (Respondent). (14 employees in unit). (*Granted*).

2560-85-R: William Frame, (Applicant) v. United Food and Commercial Workers International Union AFL-CIO-CLC, (Respondent). (15 employees in unit). (*Granted*).

2563-85-R: Doug Chase, (Applicant) v. Hotel & Restaurant Employees' & Bartenders' International Union, Local 280, Beverage Dispensers' Union, (Respondent) v. 629809 Ontario Limited, carrying on business as Dynasty Inn, (Intervener). (15 employees in unit). (*Dismissed*).

2565-85-R: Linda Boyce and Others, (Applicant) v. Canadian Union of Blind and Sighted Merchants, Local 681, (Respondent) v. Canadian National Institute for the Blind, (Intervener). (16 employees in unit). (*Withdrawn*).

2647-85-R: Ross Dale, (Applicant) v. International Brotherhood of Electrical Workers, Local Union 636, (Respondent). (4 employees in unit). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2928-85-U: Weston Bakeries Limited, (Applicant) v. The Retail, Wholesale Bakery and Confectionery Workers' Union, Local 461, and those employees listed on Schedule 'A', (Respondent). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2342-84-U: The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 27, (Complainant) v. Sparton of Canada Limited, (Respondent). (*Granted*).

3043-84-U: Service Employees International Union, Local 183, (Complainant) v. Riverview Manor, operated by Daynes Health Care Ltd., (Respondent). (*Withdrawn*).

0133-85-U: Robertson-Whitehouse, (Complainant) v. United Steelworkers of America and Local 4970 and George Teal and Jack Zannata, (Respondents). (*Dismissed*).

0193-85-U: Service Employees International Union, Local 183, A.F.L.-C.I.O.-C.L.C., (Complainant) v. Daynes Health Care Ltd. carrying on business as Riverview Manor and Omni Health Care Ltd., (Respondent). (*Withdrawn*).

0960-85-U: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88 (AFL-CIO-CLC), (Complainant) v. 574037 Ontario Ltd. (c.o.b. O'Tooles Road House Restaurant). (*Granted*).

0974-85-U: United Brotherhood of Carpenters and Joiners of America, General Workers Union, Local 1030, (Complainant) v. Morewood Industries Limited, (Respondent). (*Granted*).

0975-85-U; 0976-85-U: United Textile Workers of America, (Complainant) v. Alltour Marketing Support Service Ltd., (Respondent). (*Withdrawn*).

1120-85-U: Ontario Nurses' Association, (Complainant) v. Specialty Care Inc., c.o.b. as Franklin Lake Manor Nursing Home, (Respondent). (*Withdrawn*).

1121-85-U: United Brotherhood of Carpenters and Joiners of America, General Workers Union, Local 1030, (Complainant) v. Morewood Industries Limited, (Respondent). (*Granted*).

1207-85-U: St. Catharines Typographical Union Local 416, (Complainant) v. High Times Publication Ltd., (Respondent). (*Withdrawn*).

1380-85-U: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88 (AFL-CIO-CLC), (Complainant) v. 574037 Ontario Ltd. (c.o.b. O'Tooles Road House Restaurant). (*Dismissed*).

1414-85-U: United Brotherhood of Carpenters and Joiners of America, General Workers Union, Local 1030, (Complainant) v. Morewood Industries Limited, (Respondent). (*Dismissed*).

1474-85-U: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88 (AFL-CIO-CLC), (Complainant) v. 574037 Ontario Ltd. (c.o.b. O'Tooles Road House Restaurant), (Respondent). (*Dismissed*).

1824-85-U: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88 (AFL-CIO-CLC), (Complainant) v. 574037 Ontario Ltd. (c.o.b. O'Tooles Road House Restaurant), (Respondent). (*Granted*).

2232-85-U: International Union of Bricklayers and Allied Craftsmen, Local 3, (Complainant) v. Dejayko Masonry Limited, (Respondent). (*Granted*).

2308-85-U: Canadian Union of Public Employees and its Local 2101, (Complainant) v. Sheridan Villa - Home for the Aged of The Regional Municipality of Peel, (Respondent). (*Withdrawn*).

2309-85-U: Roland Odiase, (Complainant) v. International Molders & Allied Workers Union Local 16, for (Canron Inc. - Pipe Division), (Respondent). (*Withdrawn*).

2335-85-U: Lou Rigillo, (Complainant) v. United Brotherhood of Painters & Allied Trades, (Respondent). (*Withdrawn*).

2337-85-U: Ehman B. Lynk, (Complainant) v. International Union of Operating Engineers Local 772, (Respondent) v. Labatt's Ontario Breweries, (Intervener). (*Withdrawn*).

- 2345-85-U:** Canadian Union of Public Employees and its Local 53, (Complainant) v. Ontario Humane Society, (Respondent). (*Withdrawn*).
- 2441-85-U:** Ontario Public Service Employees Union, (Complainant) v. The Cradleship Creche of Metropolitan Toronto, (Respondent). (*Withdrawn*).
- 2445-85-U:** United Food and Commercial Workers International Union Local 633, (Complainant) v. Michael York (Toronto) Limited carrying on business as Bay Ridges 16A, (Respondent). (*Withdrawn*).
- 2454-85-U:** Canadian Union of Public Employees, (Complainant) v. Sudbury Algoma Hospital, (Respondent). (*Withdrawn*).
- 2455-85-U:** Ontario Public Service Employees Union, (Complainant) v. Huntsville District Memorial Hospital, (Respondent). (*Withdrawn*).
- 2465-85-U:** Standard Modern Technologies Corporation, (Complainant) v. Ted Lisinski and The United Steel Workers of America, Local 3252, (Respondents). (*Withdrawn*).
- 2506-85-U:** Jim Currie, (Complainant) v. Local 74 Canadian Paperworkers Union, (Respondent) v. Armand Dicaire, (Intervener). (*Withdrawn*).
- 2561-85-U:** Service Employees Union Local 478, (Complainant) v. Anson General Hospital, (Respondent). (*Withdrawn*).
- 2571-85-U:** Graphic Communication International Union, Local N-1, (Complainant) v. The Globe & Mail, Division of Canadian Newspapers Company Limited, (Respondent). (*Withdrawn*).
- 2595-85-U:** Ranko Marceta, (Complainant) v. Amalgamated Transit Union - Division 113, (Respondent). (*Withdrawn*).
- 2601-85-U:** Labourers' International Union of North America, Local 493, (Complainant) v. Atlas Construction Inc., (Respondent). (*Withdrawn*).
- 2612-85-U:** Emile Martel, (Complainant) v. United Automobile Workers Local 222, (Respondent) v. General Motors of Canada Limited, (Intervener). (*Withdrawn*).
- 2669-85-U:** United Food & Commercial Workers Union, Local 409, (Complainant) v. Workers' Co-operative Consumers Ltd., (Respondent). (*Withdrawn*).
- 2675-85-U:** Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Passas Restaurants, (Respondent). (*Withdrawn*).
- 2687-85-U:** G. Vivian Banton, and Roger J. J. Frasso, (Complainant) v. Sunnybrook Hospital Employees' Union Local 777, (Respondent). (*Withdrawn*).
- 2692-85-U:** Mike Poulton, (Complainant) v. Teamsters Union (Local 879) Hamilton, Ontario, (Respondent). (*Withdrawn*).
- 2708-85-U:** International Brotherhood of Electrical Workers, Local 353, (Complainant) v. 618830 Ontario Limited, c.o.b. as R.L.D. Electric, (Respondent). (*Granted*).
- 2709-85-U:** Ontario Nurses' Association, (Complainant) v. Madonna Nursing Home, (Respondent). (*Withdrawn*).

2757-85-U: Clark White Zealand, (Complainant) v. Bonar Rosedale Plastics, (Respondent). (*Withdrawn*).

2777-85-U: United Food and Commercial Workers International Union, Local 1105-P, (Complainant) v. Saville Food Products, Inc., (Respondent). (*Terminated*).

2785-85-U: Ontario Nurses' Association, (Complainant) v. Rainy River Valley Health Care Facilities Inc. (LaVerendrye General Hospital, Ft. Frances), and Ontario Hospital Association, (Respondent). (*Withdrawn*).

2793-85-U: International Brotherhood of Painters and Allied Trades - Local 1819 - Glaziers, (Complainant) v. Walpat Glass & Aluminum Products Ltd., (Respondent). (*Withdrawn*).

2796-85-U: International Woodworkers of America, (Complainant) v. Britannia Wood Moulding, (Respondent). (*Withdrawn*).

2802-85-U: United Food & Commercial Workers International Union, (Complainant) v. Quinte Meat Products Limited, (Respondent). (*Withdrawn*).

2811-85-U: The Canadian Union of Public Employees and its Local 1370, (Complainant) v. Little's Nursing Home (Essex) Limited, (Respondent). (*Withdrawn*).

2812-85-U: William Wintoniuk, (Complainant) v. International Brotherhood of Electrical Workers, (Respondent). (*Withdrawn*).

2845-85-U: International Ladies' Garment Workers' Union, (Complainant) v. G.S.E. Inc. carrying on business under the firm name and style as The Great Sewing Exchange and Martin Starkman, (Respondents). (*Withdrawn*).

2877-85-U: United Food & Commercial Workers Union, Local 409 chartered by United Food & Commercial Workers International Union, CLC-AFL-CIO, (Complainant) v. Codville Co. a Division of Oshawa Holdings Ltd. I.G.A. (Fort Frances, Ontario), (Respondent). (*Withdrawn*).

2878-85-U: United Food & Commercial Workers Union, Local 409 chartered by United Food & Commercial Workers International Union, CLC-AFL-CIO, (Complainant) v. Codville Co. a Division of Oshawa Holdings Ltd. I.G.A. (Fort Frances, Ontario). (Respondent). (*Withdrawn*).

2895-85-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Diamond Baling Company Ltd./R.E. Dumouchelle & Sons Limited, (Respondent). (*Withdrawn*).

2906-85-U: United Food & Commercial Workers International Union, (Complainant) v. Quinte Meat Products Limited, (Respondent). (*Withdrawn*).

2914-85-U: Mr. Leslie Viktoriusz, (Complainant) v. The Ontario Jockey Club, (Respondent). (*Withdrawn*).

2936-85-U: United Steelworkers of America, (Complainant) v. J.T.L. Machine Ltd., (Respondent). (*Withdrawn*).

3003-85-U: David Fancey, (Complainant) v. Allan Golrick (Chairman Local 9024 USW), (Respondent). (*Withdrawn*).

3004-85-U: Richard Baker, (Complainant) v. Al Goldrick (Chairman Local 9024 USW), (Respondent). (*Withdrawn*).

3005-85-U: Brian Chouinard, (Complainant) v. Al Goldrick (Chairman Local 9024) USW, (Respondent). (*Withdrawn*).

3006-85-U: John Calabrese Financial Secretary (Local 9024), (Complainant) v. Allan Goldrick Chairman (Local 9024), (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

2804-85-M: Labourers' International Union of North America Local 1036, (Applicant) v. Jaddco Anderson Construction Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2458-85-M: 375 Fenmar Woodworking Ltd., (Employer) v. International Union of Allied Novelty and Production Workers, Local 905, (Trade Union). (*Granted*).

2681-85-M: Work Wear Corporation of Canada Ltd., Windsor, Ontario, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, (Trade Union). (*Granted*).

2682-85-M: Work Wear Corporation of Canada Ltd., Brantford, Ontario, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

2784-85-M: Canadian Linen Supply (Ontario) Limited, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

JURISDICTIONAL DISPUTES

2217-83-JD: Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Concrete Column Clamps (C.C.C.) Ltd./Les Coffrages (C.C.C.) Ltee; Fix Fast Ltd./Ltee and Labourers International Union of North America, Local 527, (Respondents). (*Dismissed*).

1319-85-JD: Millwright District Council of Ontario, (Complainant) v. Lackie Bros. Ltd. and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3384-84-M: CUPE -CLC, Ontario Hydro Employees Union Local 1000, (Applicant) v. Ontario Hydro (A.C.H. International), (Respondent). (*Withdrawn*).

2041-85-M: The Corporation of the Town of Vaughan, (Applicant) v. Canadian Union of Public Employees, Local 1090, (Respondent). (*Withdrawn*).

2080-85-M: Canadian Standards Association, (Applicant) v. Canadian Union of Public Employees, Local 967, (Respondent). (*Withdrawn*).

2596-85-M: Corporation of the Townships of Casimir, Jennings, Appleby, (Applicant) v. Labourers Local 493, (Respondent). (*Dismissed*).

2598-85-M: The Kitchener City Hall Office, Clerical & Technical Staff L.U. #791 C.U.P.E., (Applicant) v. The Corporation of the City of Kitchener, (Respondent). (*Dismissed*).

2605-85-M: North American Lumber Limited, (Applicant) v. United Food and Commercial Workers Union, Local 409, (Respondent). (*Withdrawn*).

2631-85-M: The Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Lambton, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0917-85-OH: Theresa Russ, Elaine Jennings, Kelly Shields and Carole Matthewson, (Complainants) v. Cody's Stores Ltd., (Respondent). (*Granted*).

2713-85-OH: Mr. Roy Peart, (Complainant) v. Fotias Apollo Welding Ltd., (Respondent). (*Withdrawn*).

2766-85-OH: Joan Bontje, (Complainant) v. Mr. James R. Bennett, BBG Canada Ltd., (Respondent). (*Withdrawn*).

2814-85-OH: Chris Pechenkovski, (Complainant) v. Royal Acoustics and Accessories Ltd., (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1480-83-M: Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd./Les Coffrages (C.C.C.) Ltee and Fix Fast Ltd./Ltee, (Respondents) v. Labourers International Union of North America, Local 527, (Intervener). (*Dismissed*).

0953-84-M: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, (Applicant) v. City Plumbing (Kitchener) Limited, (Respondent). (*Granted*).

3483-84-M: Ontario Sheet Metal Workers Conference Sheet Metal Workers' International Association, Local 269, (Applicants) v. E. S. Fox Ltd., Ontario Sheet Metal and Airhandling Group, (Respondents). (*Granted*).

1018-85-M: International Association of Bridge, Structural and Ornamental Ironworkers Local 700, (Applicant) v. Lackie Industrial Contractors Limited, (Respondent) v. The Millwright District Council of Ontario, United Brotherhood of Carpenters Joiners of America, (Intervener). (*Withdrawn*).

1935-85-M: Millwright District Council of Ontario on behalf of Millwright Local Union 1244, (Applicant) v. Notrek Plant Services Ltd., (Respondent). (*Withdrawn*).

1936-85-M: Millwright District Council of Ontario on behalf of Millwright Local Union 1244, (Applicant) v. Inplant Contractors Incorporated, (Respondent). (*Withdrawn*).

2066-85-M: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. B. S. Construction (Ontario) Limited, (Respondent). (*Withdrawn*).

2129-85-M: International Association of Bridge, Structural and Ornamental Ironworkers, (Applicant) v. Ontario Hydro, (Respondent). (*Withdrawn*).

2145-85-M: Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. George Winston Design Limited, (Respondent). (*Withdrawn*).

2255-85-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Jean-Yves Bernard, carrying on business as Systeme Interieur Jean-Yves Bernard Engr., (Respondent). (*Granted*).

2257-85-M: Labourers' International Union of North America, Local 506, (Applicant) v. Highrock Structural Limited, (Respondent). (*Withdrawn*).

2429-85-M: Resilient Floorworkers, Local 2965, (Applicant) v. Nu-West Hardwood Flooring Contractors Limited, (Respondent). (*Granted*).

2444-85-M: North American Lumber Limited, (Applicant) v. United Food and Commercial Workers Union, Local 409, (Respondent). (*Withdrawn*).

2514-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Devon Construction Ltd., (Respondent). (*Withdrawn*).

2533-85-M: International Union of Operating Engineers, Local 793, (Applicant) v. Newcan Mechanical Ltd., (Respondent). (*Withdrawn*).

2542-85-M: Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

2547-85-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Brown Boveri Howden Inc., (Respondent). (*Withdrawn*).

2609-85-M: Resilient Floorworkers Local Union 2965, (Applicant) v. Division Construction Ltd., (Respondent). (*Withdrawn*).

2741-85-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Klæboe Installations Ltd., (Respondent). (*Withdrawn*).

2765-85-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Thunder Bay Insulations Limited, (Respondent). (*Granted*).

2769-85-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Marcantonio Plastering and Drywall Contractor, (Respondent). (*Granted*).

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2840-85-M: Ontario Provincial Conference of the International Union of the Bricklayers and Allied Craftsmen and Local 7 Canada, (Applicant) v. Ottawa Carleton Bricklaying & Masonry Ltd. and/or Olivieri Masonry Ltd., (Respondent). (*Withdrawn*).

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2884-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Denovellis and Valente Concrete and Drain, (Respondent). (*Withdrawn*).

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2986-85-M: Ontario Provincial Conference and Local 4, of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Plibrico (Canada) Ltd., (Respondent). (*Withdrawn*).

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*Ontario Labour Relations Board,
400 University Avenue,
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ONTARIO LABOUR RELATIONS BOARD REPORTS



May 1986



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NOTICE OF NEW PRACTICE NOTE

PRACTICE NOTE NO. 18

May 27, 1986

APPLICATION FOR DIRECTION

THAT A FIRST COLLECTIVE AGREEMENT BE SETTLED BY ARBITRATION

1. An application requesting the Board to direct that a first collective agreement be settled by arbitration must include:

- (a) the name, address and telephone number of the applicant;
- (b) the address and telephone number of the applicant for service;
- (c) the address and telephone number of the respondent;
- (d) the date of the certificate or voluntary recognition agreement;
- (e) a detailed description of the bargaining unit affected by the application;
- (f) the approximate number of employees in the bargaining unit described in (e);
- (g) the name, address and telephone number of the primary negotiator for the applicant;
- (h) the date of the notice from the Minister indicating he does not consider it advisable to appoint a conciliation board or the date the Minister has released the report of a conciliation board;
- (i) the dates on which negotiations were held or scheduled to be held;
- (j) a detailed statement of the material facts, acts and omissions on which the applicant intends to rely, including the time when and the place where the acts or omissions referred to occurred and the name(s) of the person(s) who engaged in the specified conduct;
- (k) a list of all documents on which the applicant intends to rely;
- (l) a copy of all documents in the applicant's possession on which it intends to rely;
- (m) a list of those bargaining matters agreed to in writing by the parties and a list of those bargaining matters which remain in dispute; and

- (n) a copy of a proposed collective agreement which the applicant is prepared to execute.

2. Prior to filing the application with the Board, the applicant must deliver to the respondent the following:

- (a) a duly completed copy of the application;
- (b) a copy of Practice Note No. 18; and
- (c) a copy of the reply form (Reply to Application for Direction that a First Collective Agreement be Settled by Arbitration).

3. The applicant must file its application in quadruplicate with the Board. The application must be accompanied by a statement certifying that the applicant has complied with the service requirements contained in paragraph 2.

4. The application will not be processed by the Board unless the applicant has complied with the requirements of paragraphs 1, 2 and 3 of Practice Note No. 18. Once these requirements have been met, hearing dates will be set by the Registrar.

5. If the respondent intends to oppose the application, the respondent must file with the Board a reply to the application within ten days from the day the application was delivered by the applicant to the respondent. If the tenth day falls on a day on which the Board's offices are not open to the public, the respondent must file the reply no later than the next working day of the Board. The reply must include:

- (a) the name, address and telephone number of the respondent;
- (b) the address and telephone number of the respondent for service;
- (c) a detailed description of the bargaining unit affected by the application;
- (d) the approximate number of employees in the bargaining unit described in (c);
- (e) the name, address and telephone number of the primary negotiator for the respondent;
- (f) a description of the general nature of the respondent's business;
- (g) a detailed statement,
 - (i) identifying the statements in the application with which the respondent agrees,

- (ii) identifying the statements in the application with which the respondent disagrees, and setting out the material facts, acts and omissions which constitute the respondent's version of the matters alleged in the statements with which the respondent disagrees, and
 - (iii) setting out all other material facts, acts and omissions on which the respondent intends to rely, including the time when and the place where the acts and omissions referred to occurred and the name(s) of the person(s) who engaged in the specified conduct;
- (h) a list of all documents on which the respondent intends to rely;
 - (i) a copy of all documents in the respondent's possession on which it intends to rely;
 - (j) a list of those bargaining matters agreed to in writing by the parties and a list of those bargaining matters which remain in dispute; and
 - (k) a copy of a proposed collective agreement which the respondent is prepared to execute.

6. Prior to filing the reply with the Board, the respondent must deliver a duly completed copy of the reply to the applicant.

7. The respondent must file its reply in quadruplicate with the Board. The reply must be accompanied by a statement certifying that the respondent has complied with the service requirement contained in paragraph 6.

8. A Labour Relations Officer may be appointed to assist the parties. A pre-hearing conference may be convened before a Vice-Chairman in order to resolve or narrow the issues in dispute.

9. Except with leave of the Board, parties will not be permitted to adduce evidence at the hearing of any material fact not disclosed in the material filed with the Board.

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0477-85-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599, Complainant, v. **Armbro Materials and Construction Limited**, and Labourers' International Union of North America, Local 183, Respondents, v. International Union of Operating Engineers, Local 793, Intervener #1, v. Metropolitan Toronto Sewer and Watermain Contractors Association, Intervener #2

Jurisdictional Dispute - Practice and Procedure - Whether contractors association having status to intervene - Sector determination necessary to resolve preliminary issues and merits of dispute - Matter relisted for sector determination hearing

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *J. Wilson* and *C. A. Ballentine*.

APPEARANCES: *Laurence C. Arnold* and *Charles Carter* for the complainant; *G. Grossman* and *D. Fryzuk* for the respondent company; *A. M. Minsky* and *Tom Connolly* for the respondent union; *Richard J. Charney* for intervener #2; no one appearing for intervener #1.

DECISION OF THE BOARD; May 14, 1986

1. This is a complaint under section 91 of the *Labour Relations Act* in which the complainant, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 ("Local 599"), requests the Board to issue a direction with respect to the assignment of certain work.

2. Although the parties have not yet reached agreement concerning a detailed description of the work in dispute, it is described in Local 599's pre-hearing brief as the installation of site services at the Honda plant building project at Alliston, Ontario (the "project") from the property line to the building line, including, but not limited to, all work required on the project in connection with off-loading and placing in position of piping materials and pre-fabricated manholes, piping, piping layout, preparation of bedding in trench, laying and joining of pipe, installation of pre-fabricated manholes, backfilling to 2' above installed pipe, and all manual work in connection with trenching and backfilling including compacting. In a letter dated March 11, 1986 in which he listed the preliminary issues about which the direction of the Board is being sought at this stage of the proceedings, counsel for Local 599 indicated that "[i]n general terms the work in dispute comprises the installation of site services from the property line to the building line, save and except excavating and backfilling when performed by the use of machines." It is common ground among the parties that the work in dispute does not include any of the work that has been assigned to intervener #1 as of March 13, 1986. The respondent Armbro Materials and Construction Limited ("Armbro") assigned the work in dispute to the respondent Labourers International Union of North America, Local 183 ("Local 183").

3. This decision is confined to certain preliminary matters which were argued before this panel of the Board on the understanding that we would not become seized of the merits of this complaint.

4. The first issue to be resolved is the status of the Metropolitan Toronto Sewer and Watermain Contractors Association (the "Association") to intervene in these proceedings. Counsel for the complainant contends that the Association should not be permitted to intervene because its interest in the proceedings is too remote. The Association, Armbro, and Local 183, on the other hand, all maintain that the Association should be granted status as an intervenor in these proceedings.

5. The Association represents a majority of the unionized sewer and watermain contractors in Board Area 8. Armbro is not a member of the Association and the Association is not an accredited employers' organization. Although there is some dispute concerning the extent to which members of the Association have been involved in the installation of site services in Board Area 18 (the Board Area in which the project is situated), it is common ground among the parties that at least two members of the Association (D'Orazio Drain and Watermain Co. Ltd., and Badner Contracting Limited) have recently performed such work in that area. Moreover, it is the position of Local 183 that the Association has granted voluntary recognition to Local 183 for Board Area 18 by virtue of Article II of the May 31, 1984 to April 30, 1986 collective agreement between the Association and a council of trade unions composed of Local 183 and Teamsters Local Union 230, which provides:

ARTICLE II - RECOGNITION

2.01 The Association on behalf of each of the Employers recognizes the Council as the collective bargaining agent for all employees of the Employers being Contractor Member companies listed in Schedule "C", hereto while working in Area No. 8 as specified by the Ontario Labour Relations Board as follows: Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foreman and those above the rank of non-working foreman, office and clerical staff, shop and yard employees and engineering staff, security guards and those employees covered by a subsisting agreement between the Association and the International Union of Operating Engineers, Local 793.

2.02 The parties agree to meet within three (3) months to agree upon a schedule for Board Area 18 as defined as the County of Simcoe, the District of Muskoka and the Townships of Rama, Mara and Thorah in the County of Ontario.

If the parties cannot agree, the matter will be resolved by binding arbitration.

A clause similar to Article 2.02 has been in collective agreements between those parties for approximately fifteen years. However, the meeting mentioned in that provision has never occurred, nor has the matter ever been referred to arbitration. Although counsel for the Association was not prepared to concede that Article 2.02 constituted a voluntary recognition agreement, he acknowledged that "there is obviously some sort of representational connection between the Association and Local 183", and also acknowledged that it has been the practice of members of the Association to apply the terms of that collective agreement in Board Area 18. Counsel for Local 599 advised the Board that it was his information that the provisions of that collective agreement have not been applied uniformly in their entirety by sewer and watermain contractors working in Board Area 18. However, he also indicated that his client does not dispute that sewer and watermain contractors working in Board Area 18 generally apply certain of the terms and conditions of employment contained in that collective agreement. Moreover, as noted by counsel for Local 183, where an employer bound by that

collective agreement sends employees from Board Area 8 “out of town” to a location (such as Alliston) which is within a 100 kilometre radius of Toronto City Hall, the employer is required by Article 18.04 of the collective agreement to “maintain the wage rates, hours of work and all fringe benefits provided for in [the collective agreement]”.

6. As noted in *Simcoe Mechanical Contracting Limited*, [1981] OLRB Rep. July 1004, at paragraph 15, “[t]he Board has for many years taken a very broad view of allowing parties to appear in [section 91] complaints”. See also *Gryd Construction Inc.*, [1975] OLRB Rep. March 231. In the circumstances of the present case, we are satisfied that the Association should be permitted to intervene since at least some of its members from time to time perform work of the type in dispute in these proceedings in Board Area 18, and since there is at least an arguable representational connection between the Association and Local 183 in respect of the performance of such work in that area.

7. The second preliminary issue argued before us pertains to area practice. The complainant contends that the relevant area practice to be considered in the hearing of the merits of this complaint is the practice in Board Area 18 with respect to the installation of site services on industrial, commercial and institutional (“ICI”) projects. The complainant further contends that no limit should be placed on how far back in time such evidence may go. In this regard, the complainant seeks to adduce evidence “going back to the 1940’s”. Counsel for Local 183, on the other hand, contends that the work in dispute is sewer and watermain work, and seeks to rely on area practice in respect of such work without regard to whether it was performed in connection with a residential project, a road, an industrial plant, or an electrical power system project. It is his position that the sewers and watermains sector cuts across the other sectors listed in section 117(e) of the Act, and that work in that sector is defined by the tasks associated with sewer and watermain construction, not by the location in which it is being constructed. He further contends that it would be an abuse of the Board’s process to permit evidence to be adduced concerning area practice which goes back more than five or ten years at the most.

8. The third preliminary issue raised by the complainant is the matter of whether Armbro and Local 183 have a collective agreement applicable to the Project. It is the complainant’s position that the collective agreement purportedly observed by Armbro and Local 183 on the project is a “sewer and watermain” collective agreement which has no application to the project because the entire project, including the work in dispute, falls within the ICI sector and can only be covered by an ICI provincial agreement. Armbro and Local 183, on the other hand, contend that the work in dispute falls within the sewers and watermains sector and that their collective agreement applies to it. They further contend that the complainant’s second and third preliminary issues raise matters which require a sectoral determination, pursuant to section 150 of the Act, and seek to have the Board defer the hearing of the merits of this complaint pending determination of that issue. *West York Construction*, [1980] OLRB Rep. Jan. 119, was cited as an example of such deferral (in the context of proceedings under section 124 of the Act). In responding to that contention, counsel for Local 599 acknowledged that a sectoral determination may be incidental to determining the applicability of the collective agreement between Armbro and Local 183 to the work in question, but argued that such determination would not be essential to these proceedings as it is not essential that there be a collective agreement in effect for there to be a jurisdictional dispute. He further submitted that if a determination must be made concerning the sector in which the work in dispute falls, it should be made in these proceedings as part of the merits

of the jurisdictional complaint. He further argued that his client has not made a section 150 application and that if one is to be made, it should be made by Armbro or Local 183.

9. Section 150 of the Act provides:

The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in the clause 117(e).

It is evident to us from the submissions of the parties and the contents of their pre-hearing briefs that in order to resolve the matters in dispute between the parties, including the second and third "preliminary issues" set forth above and the merits of this jurisdictional complaint, it will be necessary for the Board to determine whether the work in dispute is within the ICI sector, as contended by the complainant, or within the sewers and watermain sector, as contended by the respondents. We are further of the view that the issue of whether that work comes within the ICI sector should be determined under section 150 of the Act prior to the determination of any other issues relevant to this complaint, including the two aforementioned "preliminary issues". In our view, this approach is likely to prove to be the most expeditious manner of proceeding, since the determination of that matter will assist in determining the relevant area practice and the applicability of the respondents' collective agreement, and may also be of considerable assistance to the parties in resolving or narrowing this complaint.

10. Since the issue of whether or not the work in dispute comes within the ICI sector is integral to the merits of this complaint, we feel that no useful purpose would be served by requiring that the determination under section 150 be made the subject matter of a separate proceeding. Accordingly, we propose to adopt a procedure analogous to that adopted by the Board in *West York Construction*, *supra*. The matter will be relisted for hearing for the purpose of entertaining evidence and representations with respect to a determination under section 150 concerning whether or not the installation of site services at the Honda plant building project at Alliston, Ontario, from the property line to the building line, is within the industrial, commercial, and institutional sector of the construction industry. For that aspect of the proceedings, in addition to the existing parties, any trade union, council of trade unions, employer, or employers' organization having a direct connection with the project will have standing to participate. A Board Officer is hereby authorized to meet with the parties to assist them in identifying the parties which will have standing to participate in that aspect of the proceedings, and to report to the Board on the extent of agreement or disagreement respecting that matter. (See *Ellis-Don Limited*, [1985] OLRB Rep. Aug. 1204.)

11. Once the issue of whether that work falls within the ICI sector has been determined, the matter will be listed for a further pre-hearing conference, if that is felt to be advisable by the parties or the Board, or listed for hearing to deal with any outstanding issues pertaining to Local 599's complaint under section 91 of the Act. For that aspect of the proceedings, only the present parties will have standing to participate, unless otherwise determined by the panel of the Board hearing that aspect of the case.

12. This matter is referred to the Registrar for the appointment of the Board Officer for the purpose described in paragraph 10 of this decision, and for the subsequent relisting for hearing for the purpose of entertaining evidence and representations with respect to a determination of whether or not site service installation work from the property line to the

building line at the Honda plant building project at Alliston, Ontario, is within the industrial, commercial and institutional sector of the construction industry. Notices of hearing are to be sent to all trade unions, councils of trade unions, employers, and employers' organizations which are agreed by the parties or found by the Board to have a direct connection with that project.

13. This panel of the Board is not seized.
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0183-86-M United Brotherhood of Carpenters and Joiners of America, Local 18, Applicant, v. Ben Plastering Limited, carrying on business as **Belmont Plastering Company**, Respondent

Construction Industry Grievance - Practice and Procedure - Extent of particularization required when filing grievance - Respondent not entitled to particulars of theory or analysis of applicant's case

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *Stanley Simpson* and *J. Tarbutt* for the applicant; *Richard J. Nixon* and *Gaynor Halliwell* for the respondent.

DECISION OF THE BOARD; May 9, 1986

1. The Board delivered the following ruling orally at its hearing in this matter on May 2, 1986:

This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*.

The grievance alleges that on or about the evening of March 18, 1986, and possibly other dates unknown to the union, the respondent had two employees working at its Burlington City Hall job without referral slips and without proving union membership. The applicant alleges such conduct violated article 5 of the acoustic & drywall appendix of the provincial agreement binding on the parties.

During the opening statements from counsel, it became apparent that the applicant's theory of the case involves relatively straight forward allegations of fact, and an interpretation of the mobility, hiring, referral and layoff provisions of article 5 of the acoustic & drywall appendix of the provincial agreement.

Counsel for the respondent submits that the applicant should be restricted to proving the grievance as filed. He submits that the interpretation issues

alluded to by counsel for the applicant do not appear in the grievance and cannot be said to exist latently in that grievance.

In our opinion, a grievance need only particularize the factual allegations that the party filing the grievance asserts constitute a violation of the collective agreement and make some reference to the provisions of the collective agreement that are alleged to have been violated. While the grievance in this case might have been less oblique about the interpretation issues raised, the respondent is not entitled to receive particulars of the theory or analysis the applicant will be relying on to establish its case.

In any event, the respondent has been advised by counsel for the applicant about the nature of the applicant's case.

Furthermore, another grievance alleging a violation of the same article of the agreement that is in issue in this case between these parties has been referred to the Board in Board File No. 0291-86-M and is scheduled for hearing before the Board on May 13, 1986.

Both counsel have advised us that there will be six witnesses in this case, and that two days of hearing will be needed.

Since we have not started to hear any evidence in this case, and will not be able to hear very much evidence if we were to begin today, in view of the late hour, we are hereby adjourning this matter to May 13, 1986 to be listed for hearing before the same panel of the Board that is scheduled to hear the matter in Board File No. 0291-86-M.

We recognize that counsel for the applicant submitted that the issues in these two matters are different, although the same article of the collective agreement is alleged to have been violated. Nevertheless, we believe it appropriate for the panel scheduled to hear these two matters on that day to determine how they will be dealt with.

2. This matter is referred to the Registrar to be listed for hearing on May 13, 1986 before the same panel of the Board that is scheduled to hear the matter in Board File No. 0291-86-M.
 3. This panel of the Board is not seized with this matter.
 4. In view of the applicant's request for directions, unless the Board on May 13, 1986, orders that this matter and the matter in Board File No. 0291-86-M be consolidated we hereby direct that this matter (Board File No. 0183-86-M) proceed first on May 13, 1986.
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1129-85-R Mike Brinovec, Complainant, v. Sheet Metal Workers International Association, Local 575, Respondent

Duty of Fair Representation - Unfair Labour Practice - Whether failure to proceed to arbitration unlawful - Whether discrimination because of disability - Whether failure to follow result of membership meeting or retroactive insertion of additional grievance step unlawful - Whether union's financial situation relevant

BEFORE: *Patricia Hughes*, Vice-Chairman.

APPEARANCES: *Mike Brinovec* on his own behalf; *Guy Beaulieu* and *Celso Adriano* for the respondent.

DECISION OF THE BOARD; May 14, 1986

1. This is a complaint under section 89 of the *Labour Relations Act* ("the Act") in which Mike Brinovec, the complainant, alleges that the respondent, the Sheet Metal Workers International Association, Local 575 ("the union"), contravened section 68 of the Act. He claims that the respondent did not represent him fairly because it failed to take his grievance to arbitration. The respondent claims that it has fairly represented Mr. Brinovec.

2. The Board first considered this allegation on October 1, 1985. At that time, the Board, differently constituted, in an oral decision (issued in written form October 4, 1985), adjourned the hearing on the agreement of the parties in order to permit the parties to engage in the fourth step of the grievance procedure, the settlement officer stage. The period of adjournment, determined by reference to a group grievance then before an arbitration board, was upon agreement of the parties. The outcome and significance of the fourth stage in the grievance procedure and of the group grievance are dealt with below. Both those events having now occurred, the complaint was again brought on for hearing at the request of the complainant. The hearing took place on April 23, 1986.

3. In his evidence Mr. Brinovec related a history of uneven relations with both the union and the company. Indeed, he appears to have had a rather traumatic employment relationship with his employer, one which was at times successfully and at other times unsuccessfully dealt with by his union. This evidence was admitted without objection by the union. The Board has previously considered the history of the way in which the union had represented the complainant prior to the grievance which is the subject of the complaint before the Board in determining whether the complaint has been substantiated: for example, see *Scarborough General Hospital*, [1977] OLRB Rep. Nov. 770. Apart from one incident, in which Mr. Brinovec claims that a grievance of his had been lost by the union, the union had assisted Mr. Brinovec in accordance with the requirements of section 68. There was insufficient evidence to establish the exact nature of the circumstances surrounding the alleged lost grievance. I find that the union's response to Mr. Brinovec prior to the grievance which is the subject of this complaint does not indicate a history of unfair representation.

4. Mr. Brinovec had been an Assembler "A" for four years when on February 20, 1981, he injured his back. He subsequently suffered a heart attack and underwent a triple bypass heart operation. Apparently, upon his return to work, he was fired. The union was of

the view that it could not help him. Mr. Brinovec hired a lawyer who took his grievance to arbitration. He was reinstated in the electrical department (apparently not the same department in which he had been working prior to his absence), but as an Assembler "B" at an Assembler "B" rate. He argues that he was often doing the work of an Assembler "A", even though he was being paid at the "B" classification rate. Mr. Brinovec obtained signatures from fellow workers on a petition dated June 19, 1985, which stated that he was doing the same job as the people classified as Assembler "A". None of the signers of the petition was called to present evidence at the hearing. He also obtained a letter from his foreman, Edward Bayes, stating that he was capable of performing the duties of Assembler "A" ("the Bayes letter"). That letter went on to state that "[u]nfortunately, because of the collective agreement and his health restrictions, it was very difficult to promote him to 'Assembler A', regardless of his potential". The Bayes letter does not indicate that Mr. Brinovec was actually performing Assembler "A" work. Nor was Mr. Bayes called as a witness. Therefore, I can give little, if any weight to the contents of this letter, with respect to the type of work Mr. Brinovec was actually performing during the period in question.

5. Mr. Brinovec evidently returned to work sometime in November 1982. It seems that during his absence, the company had laid off nearly a third of its employees and then demoted others. Some of these demotions were the subject of a group grievance in which the union claimed that the demoted employees should be paid the Assembler "A" rate because they were performing Assembler "A" work, although they were classified as Assembly "B" employees. The group grievance involved nine employees; in addition, there was an individual grievance dealing with the same issue. The arbitration board's hearings into these grievances were held on June 19, 1984 (the individual grievance) and May 21, 1985 and October 31, 1985 (the group grievance). The majority decision in the individual grievance was dated September 28, 1984 and the group grievance decision December 31, 1985 (it was apparently issued in January 1986). The individual grievance was dismissed; two of the group grievances were dismissed and in the other seven grievances, the grievors were awarded compensation for periods of time spent doing Assembler "A" work, primarily instruction of, training or "helping out" other Assembly "B" employees, particularly those new to the job. The union was not happy with the arbitration board's decision and sought legal advice with respect to a judicial review. According to Celso Adriano, President of Local 575, the advice received was that there would be little chance of a successful judicial review. The union therefore felt compelled to treat the arbitration decision as the "guideline" in classification pay rate matters for the time being.

6. Mr. Brinovec filed the grievance which is the subject of his complaint to the Board on May 22, 1985. The grievance progressed to the third stage of the grievance procedure and, as provided by the procedures then in effect, the union membership voted on whether the grievance should be taken to arbitration. The membership voted unanimously to take his grievance to arbitration. However, the union did not act in accordance with that vote (hereinafter called "the first membership vote"). The significance of the membership vote is considered below.

7. At this point, the nature of the grievance should be determined since its relation or similarity to the group grievance is a matter of dispute between the parties. Mr. Brinovec often used the term "reinstatement", meaning that he believes that he should be classified as an Assembler "A" and not just paid the Assembler "A" rate while classified as an Assembler "B". The distinction is important because the group grievance, which plays a large role in the union's decision not to take Mr. Brinovec's grievance to arbitration, is concerned with pay

rates. If Mr. Brinovec's grievance is in fact that he should be "reinstated", the relevance of the group grievance may be diminished. The Board's decision of October 4, 1985 stated at paragraph 2 that

The parties agreed that the group grievance ... deals with essentially the same issue, i.e., classification, as the complainant raises, although the complainant alleges his personal circumstances may be somewhat different.

At the April 23, 1986 hearing, Mr. Brinovec used the term "reinstatement" in his evidence. However, he stated in the "Explanation" submitted by him as Exhibit 2: "I am not asking for a new position but I am asking to be paid for the job I perform just as others do". Between the words "be" and "paid", the handwritten word "Rienstejtet" has been inserted. Mr. Brinovec did not explain this document further. Although he was not cross-examined on it, I find it of little assistance. I note, too, that on his own admission Mr. Brinovec has not applied for an Assembler "A" position in the electrical department (his view was that he did not need to apply). It appears that there has not been a posting of a permanent vacancy in that department, although there was some evidence that two other people had been temporarily promoted to Assembler "A". (Mr. Brinovec did complain that other persons had been promoted, even though they had less seniority than he did. However, he does not appear to have filed a grievance with respect to these promotions and they did not constitute specific allegations in the complaint before the Board.) I find that Mr. Brinovec's grievance relates to rates of pay, not to a failure to reclassify him. When asked what differentiated his grievance from the group grievance, Mr. Brinovec answered that he was in a different department than the other grievors, but he did not or could not clarify why that distinction was significant. The arbitration decision itself provides no indication of why that factor would be significant. I am unable to find that Mr. Brinovec's grievance differs in any substantial or material way from the group grievance. Furthermore, even if the group grievance and Mr. Brinovec's grievance do differ in a material way, I find that the evidence is that Mr. Adriano addressed himself to this question, compared the grievances and found them to be comparable.

8. Before considering the nature of the duty under section 68, and the application of that duty to the specific facts of this case, I find it useful to summarize the various elements of Mr. Brinovec's complaint against the union. Mr. Brinovec did not himself summarize his concerns; it has been necessary to cull the significant elements from his somewhat rambling testimony. His major allegations appear to be that the group grievance was irrelevant to his own grievance; that the union's financial condition was irrelevant to the disposition of his own grievance; that the union acquiesced in what Mr. Brinovec asserted to be the employer's discriminatory treatment of him on the basis of disability; that the union was bound to act in accordance with the first membership vote to arbitrate Mr. Brinovec's grievance; and that he was somehow improperly omitted from the list of group of grievors.

9. Section 68 of the Act requires that a union "shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit". It is now well-established that the test in section 68 cases is not whether the union made the "right" decision in not acting in accordance with the complainant's wishes, but whether the union acted reasonably in doing so. A union is by definition a collective entity and while the interests of the individual members, as individuals, cannot be ignored, they must be assessed in conjunction with the interests of and the union's obligations to the collectivity. It is labour relations policy in Ontario that as long as the individual has not been treated in a discriminatory or an arbitrary way or in bad faith, the union can decide to subordinate the

individual to the collective. Section 68 does not purport to protect the individual's right to be treated exactly as he or she wishes, but only to be treated fairly. It is intended to ensure that any failure to pursue the individual's interest does not arise from hostile or irrelevant motives.

10. The question to be asked in this case is: "did the union address its mind in a rational manner to the question of whether it was appropriate to pursue Mr. Brinovec's grievance to arbitration?" Among the factors the union can consider in making its decision which are relevant in this complaint are the likelihood of winning the grievance, the cost of taking the grievance to arbitration, the relative cost in light of the resources of the union and the interests of the other members of the union. These factors were all properly taken into account by Mr. Adriano when he decided not to take Mr. Brinovec's grievance to arbitration. In my view, Mr. Brinovec has been unable to show that the union had breached its duty of fair representation under any of the heads of section 68.

11. A union will be considered to have acted in an arbitrary manner if its officials have acted capriciously or unreasonably or, put another way, if they have failed to direct their minds to the complainant's concerns: *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791; *De Havilland Aircraft of Canada Ltd.*, [1979] OLRB Rep. Oct. 933; *Leonard Murphy*, [1977] OLRB Rep. Mar. 146. The union is allowed to be wrong in its judgment and even negligent, but it cannot dismiss the complainant's request out of hand, nor can a course of conduct be "so reckless to be unworthy of protection": *CUPE, Local 1000*, [1975] OLRB Rep. May 444; *Royal Ontario Museum*, [1980] OLRB Rep. Jan. 106. As was said in *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067 at paragraph 38:

Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

Mr. Adriano testified that he considered the likelihood of success and the burden on the union's meagre resources in deciding not to take Mr. Brinovec's grievance to arbitration. The loss of the group grievance and the legal advice received by the union to the effect that they should not seek judicial review of the arbitration decision convinced Mr. Adriano that the chances of winning Mr. Brinovec's grievance were very low. Mr. Brinovec argued that his grievance should not be dependent on the loss of the group grievance. He said, "you can't say that because one person loses, others must also lose". However, this was a legitimate consideration for the union to take into account in determining how to deal with Mr. Brinovec's grievance: *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618; *Douglas Aircraft of Canada Ltd.*, [1979] OLRB Rep. Aug. 745. Furthermore, the resources of the Local were in dire straits, it seems, and the money required to fund an arbitration of Mr. Brinovec's grievance does not appear to have been readily available. While lack of funds in and of itself may not always justify a decision taken by a union not to process a grievance, in this case there is nothing to suggest that the union has acted irresponsibly, recklessly or improperly in the administration of its funds. Rather the financial problems seem to have arisen from the union's arbitrating of grievances similar to Mr. Brinovec's grievance. Therefore, spending the union's now limited resources on this grievance with an apparently low chance of success might rationally be judged to be against the interests of the other members of the union.

12. These factors were all raised in three letters. The first letter is from Mr. Adriano to Mr. Brinovec, dated April 7, 1986. The letter states:

This is to inform you that the "A" and "B" rates policy grievance in the Board of Arbitration, has now been determined, base [sic] on the awards and the *similarity of your grievance*, we

are expecting reply to the management to make decision on your case or we may file your case to the Board of Arbitration.

(emphasis added)

Similarly, we are enclosing the two copies of the Arbitration Board award for your perusal, at same time I would also like to inform you that *your grievance, together with other grievances will have to undergo the same process for possible [sic] funding*. Considering our present ailing financial condition that due to excessive cases for the past 18 months with Carrier Canada, Ltd, [sic] *our union fund has been greatly drained* and it seems that the company [is] intentionally arbitrating the union to death by means of exhausting its fund.

(emphasis added)

The second letter is from Mr. Adriano to Mr. Ralph Sawden, Manager, Personnel and Industrial Relations with the employer, Carrier Canada Limited, dated April 10, 1986, "Re: Mr. Mike Brinovec grievance No. 95228504, A & B, rates demotion". In that letter, Mr. Adriano requests the company to act on Mr. Brinovec's grievance in accordance with the group grievance arbitration decision "or shall we proceed filing this case to the board of arbitration". In his reply dated April 17, 1986, Mr. Sawden states that "[i]t is the company's position that in reviewing the findings of the arbitration, the company does not owe Mr. Brinovec any moneys for the subject grievance."

13. The timing of these letters raises some concern. The arbitration decision was issued in January 1986. Mr. Brinovec wrote to the Board on February 10, 1986 requesting that his complaint be rescheduled. The parties were informed by letter from the Board's Registrar dated February 18, 1986 that the hearing had been rescheduled for April 23, 1986. Yet the only written evidence that Mr. Adriano had raised these issues with Mr. Brinovec and had attempted to settle the grievance with the company was dated approximately two weeks before the scheduled hearing. It could be argued that these letters are self-serving. However, while the dates of the letters raise some doubt in my mind about their purpose, Mr. Brinovec did not object to the admission of these letters, nor did he challenge them in his cross-examination of Mr. Adriano. I therefore accept that they are *bona fide* attempts to deal with Mr. Brinovec's grievance. Accordingly, I treat the letters as evidence that Mr. Adriano considered both the similarity of Mr. Brinovec's grievance to the group grievance and the financial burden arbitration of Mr. Brinovec's grievance would place on the union. I treat them also as evidence that Mr. Adriano attempted to settle the grievance with the company. I conclude on the basis of these letters and Mr. Adriano's oral evidence that Mr. Adriano weighed the relevant factors and determined that the union should not pursue Mr. Brinovec's grievance to arbitration. I conclude further that the union did not act in an arbitrary manner towards Mr. Brinovec.

14. The discrimination head of section 68 raises three issues. The first issue requires examination of the role of malice in motivating differential conduct or provisions; the second involves consideration of who is protected by this head of section 68; and the third deals with the limits placed on the application of the concept. In my view, the concept of "discrimination" in labour relations law cannot be immune from developments in the law relating to discrimination; however, the underlying reasons for including "discrimination" in section 68 and the standard applied to unions in justifying conduct or provisions which do differentiate among employees must be seen in the context of the special concerns of labour relations law.

15. The first issue is whether hostility must underlie the different treatment to bring it within section 68. In *CUPE, Local 1000, supra*, the Board indicated the narrow limits of the term when it stated that under the discrimination head of section 68, “an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union”. On this view, there cannot be a finding of discrimination unless the union has been motivated by ill will to disregard the interests of the complainant. A broader interpretation of the concept of discrimination for the purposes of section 68 was set out in *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779, where the Board stated that the “union may not act in a manner that will result in discrimination”. The complainant in that case alleged that provisions in the collective agreement which gave super-seniority to Zone Committeemen and Shop Stewards were discriminatory. The impugned provisions differentiated on their face because they gave a benefit to some employees (because of their status in the union) and not to others. But the collective bargaining process by which the provisions had been included in the agreement was not alleged to be discriminatory. There was no argument that the clause had not been approved through the proper process. Thus the issue was whether a clause resulting from proper process could be discriminatory within the meaning of section 68. The Board took the position at paragraph 14 that

the discrimination branch of section [68] is sufficiently broad to prohibit the existence of a discriminatory clause in a collective agreement which was concluded through a non-discrimination [sic] process ... [T]he intention of section [68] is to prevent a tyranny of the majority. Such a tyranny can result from, among other possibilities, the ability of the majority to ‘properly’ vote any provision into a collective agreement.

The Board concluded that the particular clause in question was “not discriminatory under section [68] because it is justified by a good labour relations purpose”. In my view, this interpretation is more consistent with the development of the concept of discrimination now extant in human rights law. Furthermore, this interpretation is supported by the inclusion of “good faith” as a separate head under section 68; the concept of “good faith” itself encompasses notions of ill will or hostility.

16. With respect to the second issue, the concept of discrimination within the meaning of section 68 has never been restricted to the “traditional” forms of discrimination such as racial discrimination: in *Ford Motor Company of Canada Limited*, [1973] OLRB Rep. Oct. 519, the Board pointed out that while the origin of the term in American jurisprudence leads to an association with racial discrimination, it is not so limited in section 68. The general test of whether the union has acted in a discriminatory way was articulated in *Steinberg’s Ltd.*, [1972] OLRB Rep. May 423 at paragraph 11: the Board dismissed the complainant’s allegation of discrimination because

There is nothing to suggest this [sic] his grievance was dealt with by the union at any stage of the proceedings differently from a grievance filed by any other member of the union.

Seen in isolation, this definition suggests that any form of differentiation or different treatment constitutes discrimination. The answer to the second question, then, is that access to the discrimination head of section 68 is not limited to persons who can point to some traditional basis (such as race, sex or religion) for the different treatment, but is available to any employee who believes he or she has been subject to differential treatment.

17. However, different treatment is merely a starting point. Different treatment in itself

will not guarantee the complainant success. Once an employee has established a *prima facie* case of differential treatment, it becomes incumbent upon the union to explain that treatment and to show that it was based on non-discriminatory factors. Accordingly, it is understood either that discrimination is inherently limited by the term “reasonable” or by some similar term or that certain kinds of discrimination may be defensible. Both approaches have been followed in the Board’s jurisprudence. The Board seemed to take the first view in *Ford Motor Company, supra*, where it stated that the prohibition against discriminatory conduct is intended to “prevent a union from distinguishing among members in the bargaining unit unless there are cogent reasons for so doing”. The second interpretation can be found in *Bernard Dorais, [1985] OLRB Rep. Mar. 408* at paragraph 19:

different treatment does not always equal discriminatory conduct that is contrary to section 68 or 69 of the *Labour Relations Act*. If that were so, every time a trade union treated one employee in a bargaining unit differently from another bargaining unit employee, a violation of section 68 of the Act would occur. Employees may be treated differently by their union based on, for example, their job functions, length of service, employment status and other similar factors. Different treatment based on those grounds alone would not give rise to even a *prima facie* violation of the Act. However, differences in treatment which are not patently justifiable may call for an explanation from the trade union.

In *Douglas Aircraft Co. of Canada Ltd., supra*, the Board did not clearly distinguish these two approaches. At paragraph 35, the Board held that “a distinction between union officials and non-union officials based on this ground is not discriminatory under section [68] because it is justified by a good labour relations purpose”, but then goes on at paragraph 36 to state that the impugned provisions of the collective agreement “comprise an acceptable form of discrimination and are not thereby in violation of the discrimination branch of the union’s duty of fair representation”. Regardless of whether the Board declines to find discrimination where there is a legitimate explanation for different treatment or whether it finds discrimination which it then concludes is justified or permitted because of a valid labour relations purpose, it is common ground that every instance of different treatment is not prohibited by section 68.

18. There are three aspects of this complaint which must be addressed under the discrimination head of section 68. The first is an allegation by Mr. Brinovec that he was being dealt with on the basis of his disability; the second involves the disregarding of the first membership vote; and the third is the fact that Mr. Brinovec was not included in the group grievance. There is no suggestion that any of these instances of alleged differential treatment were motivated by malice. However, that is not the end of the inquiry. I must consider whether Mr. Brinovec has made out a *prima facie* case that he was treated differently and if I find that he is successful in doing so, I must consider whether the union has explained the differential treatment in such a way that it does not constitute a violation of section 68. Put another way, I must first decide whether Mr. Brinovec has shown that the union has discriminated against him and if I so decide, whether the union has justified the discrimination.

19. Mr. Brinovec stated in his “Explanation” that he was refused an Assembler “A” rate because of his disability resulting from his heart attack and operation. He stated that Mr. Adriano told him that his disability was the reason the company would not give him the “A” rate, but that Mr. Adriano further told him that he (Adriano) was merely relaying to Mr. Brinovec what the company had told him. Apart from the reference in the Bayes letter of April 7, 1986 to Mr. Brinovec’s “health restrictions” (which, indeed, may have been referring to a different sort of restriction, since a certificate from Mr. Brinovec’s doctor states that Mr. Brinovec should avoid “draughty” areas because of chronic back problems and his

heart surgery). There was no further evidence on this matter. Mr. Brinovec did not establish that the union had represented him unfairly by discriminating against him because of his disability.

20. In the first membership vote, the union members voted unanimously to take Mr. Brinovec's grievance to arbitration. The vote occurred on July 17, 1985, prior to the arbitration decision in the group grievance, but after two of the three days of hearings into the grievances before the arbitration board. It was taken after the third stage of the grievance procedure had been completed, in accordance with the grievance procedures then in effect. Mr. Brinovec believes that he should be able to benefit from the first membership vote which he sought in good faith. However, during the progress of Mr. Brinovec's grievance, a fourth step was inserted in the grievance process, reflected in Article 10 of the collective agreement, which permitted the parties to meet with a grievance settlement officer. It was applied retroactively to all the grievances being processed. The union's representative stated that all other grievances outstanding at the time of the change in the process had been processed according to the new procedures. Mr. Brinovec could not dispute this claim since he did not know, nor did he seem to care, how other grievances had been treated. The question is whether Mr. Brinovec was discriminated against by the retroactive application of the new procedures. There is no evidence that the new procedures were put into effect without following the usual and appropriate channels (Mr. Brinovec suggested that the new collective agreement had not yet been signed, but his submissions on this point, as on others, were somewhat confused and in any case, I find below that he acquiesced in the new arrangement). Yet the result of the additional step for Mr. Brinovec was different from the result for other employees who had been able to take advantage of a membership vote in their favour. He had followed the same process, but suddenly found it gave him no benefit.

21. There are several reasons why the first membership vote does not lead me to conclude that a failure to follow it constitutes discrimination (or any other form of conduct prohibited by section 68). First, there was no evidence before me that the union was bound by such a vote. The membership vote is merely one factor to consider in determining whether the union has contravened section 68. The significance of vote for or against taking a grievance to arbitration must be assessed in the context of all relevant factors. In this case, the vote was consistent with the decision to arbitrate the group grievance. At that point, the union was optimistic that it would win the group grievance; there is nothing to suggest that the members were not also optimistic. The loss of the group grievance required a reassessment of the union's position on such grievances. The significance of the membership decision to arbitrate Mr. Brinovec's decision also has to be reassessed in that light. It would be unreasonable to hold that a vote taken before the decision on the group grievance should bind the union to arbitrate the same issue once it knew the issue had been lost. Secondly, I note that there is no evidence before me to indicate that the settlement officer stage was inserted for any reason other than an attempt to secure resolution of grievances without having to go to arbitration. In any case, Mr. Brinovec cannot now claim the benefit of the first membership vote since he agreed to the application of the new fourth stage to his grievance. Mr. Brinovec did not dispute the union's assertion that he had not raised the first membership vote at the prior hearing of the Board. The Board's decision of October 4, 1985 was in part based on the agreement of the parties that they would pursue this fourth step in the procedure before dealing with the section 68 complaint before the Board. Mr. Brinovec agreed to go to this fourth step and therefore implicitly, if not explicitly, accepted that the grievance process had changed. Mr. Brinovec's acceptance of the new system was inherent in his agreement to the

Board's decision of October 1985. Therefore I reject Mr. Brinovec's argument that since the membership had voted unanimously to take his grievance to arbitration, the Local was required to go to arbitration. Under the new system, the membership would vote only after the fourth step. Thus the initial membership vote was apparently vitiated by the change in procedures, a change which Mr. Brinovec was willing to employ in attempting to resolve his grievance. Mr. Brinovec still has the opportunity to seek membership approval to go to arbitration. Of course, he must realize that on this second vote, the membership would be aware that the union lost the group grievance, a development which occurred after the first vote. At the same time, Mr. Brinovec must understand that this change in circumstances is significant. The loss of the group grievance is highly relevant to the fate of Mr. Brinovec's grievance; although it is possible that his grievance would be resolved differently, it is not probable, and it is not unreasonable for the union to act on the assumption that Mr. Brinovec's grievance would not be treated differently from the group grievance. I have already stated that I can find no major distinctions between the group grievance and that of Mr. Brinovec to justify expecting the union to fund Mr. Brinovec's grievance.

22. The final aspect under the discrimination head involves the omission of Mr. Brinovec's grievance from the group grievance. Mr. Brinovec had not signed the list of group grievors. The evidence with respect to why he did not sign the list was not clear. He stated that the list had not been presented to him and that he did not know about it. He seemed to suggest that the process of gathering signatures had the effect of excluding him, but again he was unable to be specific in this regard. Mr. Adriano was not able to offer any further light on this question. He testified that as far as he knew, everyone who was concerned about demotion and rates of pay had signed the list. Mr. Brinovec's own grievance was not filed until May 22, 1985 and Mr. Brinovec did not allege that Mr. Adriano or any other members of the union executive knew about his concerns prior to that date. The group grievance was filed prior to June 19, 1984, the date at which the arbitration board held its first hearing. There is no evidence to show that Mr. Brinovec was deliberately omitted from the list of group grievors. Nor, given the result of the group grievance, is there any evidence that Mr. Brinovec was obviously disadvantaged by not being included in it.

23. In my view, Mr. Brinovec has not established that he has been discriminated against by the union, either in a general sense or specifically on the basis of his disability.

24. In *Leonard Murphy, supra*, the Board stated that bad faith requires evidence of union hostility towards the grievor or motivation by factors extraneous and counter to legitimate bargaining concerns. The outer limits of this head were set out in *Steinberg's Limited, supra*, at paragraph 12:

We are not concerned here with whether or not [the union's conclusion that they could not win the grievance was] a correct decision. As was said by the Board in *Rutherford's Dairy Limited*, [1972] OLRB Rep. (March), '... A union may make a mistake in the manner in which it represents employees; however, if that mistake was made in good faith and without *mala fides*, it cannot be found that the union has violated the provisions of section [68]'. In other words, if the union has in good faith decided not to proceed with the grievance because, in their opinion, they would not succeed before an arbitrator or arbitration board, there has been no breach of section [68] by the union. The section does not impose an absolute duty on the union to carry every grievance filed by an employee through to the arbitration process.

Mr. Brinovec's allegations do not encompass any suggestion, nor was there any evidence to indicate, that the union acted in bad faith. I conclude that the union has not contravened the bad faith element of section 68.

25. In summary, I find that subsequently to the Board's decision of October 4, 1985, and after the failure to resolve the grievance at the settlement officer stage, Mr. Adriano, acting for the union, decided not to take Mr. Brinovec's grievance, which Mr. Adriano had determined was similar to the group grievance, to arbitration because the result of the group grievance indicated to him that Mr. Brinovec's grievance was not likely to be successful and because of the union's difficult financial condition. I therefore conclude that the union has acted reasonably in its handling of Mr. Brinovec's May 22nd, 1985 grievance.

26. The complaint of Mike Brinovec is hereby dismissed.

0156-86-R Labourers' International Union of North America Local 527, Applicant,
v. **Colibri Construction Inc.**, Respondent

Build-up - Construction Industry - Two contracts in hand and third contract expected increasing workforce of construction employer from three to twenty-four - Build-up not taken into account - Application of build-up principle in construction industry

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

DECISION OF THE BOARD; May 16, 1986

1. In this application for certification the applicant filed one combination application for membership and receipt. The combination application for membership is signed by the employee and the receipt is countersigned and indicates that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The applicant also filed one certificate of membership. The certificate is signed by the member and indicates that monthly dues of \$10.00 have been paid for at least one month within the six-month period immediately preceding the terminal date of the application. The certificate is checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, a list of employees containing four names on schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. Since the material filed by the applicant claimed that there were only three employees at work in the bargaining unit sought in the application and accepted by the reply, a check of the respondent's records was made by a Board Officer. That check confirmed that there were three employees at work in the bargaining unit on April 15, 1986, the date of making of the application, and the Board so finds.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under

section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 28, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. Paragraph 13 of the reply, "Other relevant statements", contains the following representations in support of a request for a hearing for the purpose of presenting evidence and making further representations "... in respect of the build-up issue".

The Respondent presently has contracts signed with the Regional Municipality of Ottawa-Carleton to repair the O'Connor Street bridge, and with Carleton Condominium Corporation number 105 to repair the parking garage at Brittany Place. Both of these jobs will commence in the month of May. The respondent also anticipates obtaining a letter of intent indicating that a contract will be signed early in the month of May for repairs to the parking garage at Place de Ville for the Campeau Corporation. These three jobs will require approximately twenty-five (25) employees within the proposed bargaining unit by the end of May.

The Respondent therefore submits that the existing group of four (4) employees would not be representative of the wishes of the employees as a whole. The proposed bargaining unit will have expanded to at least twenty-five (25) employees within a month of the date of this response. The Respondent therefore submits that a representation vote should be held at the end of May, 1986.

8. Assuming to be true everything the respondent has stated in paragraph 13 of the reply, what has been depicted is the common state of affairs in the construction industry. Construction business most frequently consists of performing a series of relatively short-lived contracts, a major factor responsible for the short-term employment relationship typical of the industry. That is why it has been the Board's consistent practice to consider only those persons at work in the bargaining unit on the date of making of the application for purposes of deciding how many employees are in the unit and how many of those employees are members of the applicant within the meaning of the Act. That also is why the Board just as consistently has ignored diminution of or accretion to the bargaining unit, including what is more particularly referred to as build-up, after the date of application.

9. In the instant application, the facts, as assumed correct, are that there were three employees at work on one job on the date of application. Firm contracts are in hand for two more jobs and there is an expectation of a third one, all of which will add 21 more employees to the bargaining unit. This is quite a different circumstance from the fact situation which confronted the Board in *J. G. Fitzpatrick Construction Ltd.*, [1972] OLRB Rep. May 485. In that case, on a single project which would require continuous employment for a year in order to complete the employer's contract, the size of the bargaining unit was projected to increase from four employees on the date of application, to sixty employees one month later and to double that number in a further month. At the time of the hearing, at least half of the total employees were already employed. In those circumstances, the majority of the Board concluded that a representation vote would give "appropriate consideration" to the "... short term employment features of the construction industry" and any need to balance the right of existing employees to collective bargaining with the right of future employees to choose their bargaining agent. In two other decisions, the Board gave heed to circumstances analogous to "build-up". Those are *Industrial Mine Installations Limited*, [1968] OLRB Rep. May 217 and *Kent County Contractors*, [1983] OLRB Rep. Apr. 549. In the *Kent County* decision the Board decided to hear submissions respecting how it should exercise its statutory discretion on alleged build-up because of the intermingling of that issue with other issues the Board was required to decide. These cases too are readily distinguishable on their facts from the facts assumed herein.

10. Therefore, pursuant to the Board's discretion under section 119(2) of the *Labour Relations Act*, the Board will not have any regard to any increase after the application date in the number of employees found to be employees in the bargaining unit described above as at the date of application. For that reason, having further regard to the Board's discretion under section 102(14) of the *Labour Relations Act*, there is no need to hold a hearing into this application.

11. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining

agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

12. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2718-85-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant, v. Warrington Products Inc., c.o.b. **Cornwall Plastic Products**, Respondent

Build-up - Certification - Board considering possibility of union members leaving employment and new employees joining union leading up to date when halfway point in projected workforce reached - Assuming that proportion of union support will remain constant - Not necessary that all classifications occupied before outright certification

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *W. G. Donnelly* and *R. Wilson*.

APPEARANCES: *S. B. D. Wahl* and *F. Da Silva* for the applicant; *Richard J. Nixon* and *Suzanne Duncan* for the respondent.

DECISION OF THE BOARD; May 16, 1986

1. The name of the respondent is amended to read: "Warrington Products Inc., c.o.b. Cornwall Plastic Products".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. For the purposes of clarity, the Board notes the agreement of the parties that "accounting are included in the term office staff".

6. Section 7(1) of the Act provides as follows:

Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

This application was filed on February 6, 1986. In accordance with its general practice, the Board sets February 17, 1986, the terminal date in this matter, as the time, under section 103(2)(j) of the Act, for the purpose of ascertaining membership under section 7(1) of the Act.

7. On the date of the filing of the application there were 70 employees in the bargaining unit. Prior to the terminal date, the applicant filed evidence of membership with respect to 52 of these employees. However, one of the persons for whom the union filed membership evidence appears to have signed the relevant membership card after the application date *and* after he ceased to be an employee of the respondent. We are, in the circumstances, not prepared to give any weight to the membership evidence relating to this individual. Accordingly, we conclude that the applicant filed acceptable evidence of membership with respect to 51 of the 70 individuals who were employees in the bargaining unit on the date of the making of the application. This level of membership support, in excess of 70 per cent, exceeds the 55 per cent required under the Act for a trade union to be certified outright.

8. Even in instances where, as here, a trade union has met the statutory requirements for automatic certification, section 7(2) of the Act gives the Board a discretion to direct the taking of a representation vote. The respondent contends that the Board should exercise its discretion in the circumstances of this case and direct the taking of a vote because of a projected build-up in the number of employees in the bargaining unit.

9. In cases involving a projected build-up in the number of employees, the Board seeks to balance the right of persons presently employed to collective bargaining against the right of future employees to select a bargaining agent of their own choice. As the Board noted in the *Canadian Cannery Limited* case, 57 CLLC 18,056, a refusal to certify immediately tends to deprive the current employees of their right to collective bargaining, including the right to engage in legal strike activity. However, immediate certification will prevent future employees from having input into selecting a bargaining agent (or deciding not to be represented at all) for some period of time due to the provisions in the Act relating to the displacement and termination of bargaining rights.

10. The Board surveyed the criteria it has applied in trying to balance the interests of the two groups in *F. Lepper & Son Ltd.*, [1977] OLRB Rep. Dec. 846 at pp. 847-848:

Over the years the Board has developed some guideposts to assist it in the balancing of the rights of these two groups of employees. *Firstly*, the Board requires that there be a real likelihood that a build-up will take place; there must be a firm plan for an imminent build-up. (See *Power Controls*, [1967] OLRB Rep. Mar. 954, *Cameron Packing Inc.*, [1972] OLRB Rep. Nov. 988, and *Canron*, [1967] OLRB Rep. Sept. 750.) As well, the actualization of the build-up must be relatively certain. It should not, in other words, be dependent on market factors well beyond the control of the employer. In *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829, for example, the Board ruled that the planned build-up was not sufficiently firm to delay the vote because the build-up was almost totally dependent on the unstable market

conditions in which the respondent's industry was engaged. The Board made a similar ruling in *Cameron Packaging Inc.* (*supra*), where the projected build-up was dependent on the next year's market and competitive conditions. *Secondly*, the planned build-up must take place within a reasonable period of time. While each case must be decided on its own facts, we note that in *Vulcan Equipment*, [1974] OLRB Rep. May 285, a build-up over a period of seven months was allowed; in *United Asbestos*, [1974] OLRB Rep. April 234, a build-up over a period of some sixteen months was allowed. In *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637, on the other hand, a build-up spanning between one and five years was not allowed. *Thirdly*, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If less than fifty per cent of the expected total are then employed it is normally felt that the group is not sufficiently representative and that the application is therefore premature. (See *B. F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693.) *Fourthly*, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application. (See *Ford Motor Co.*, [1967] OLRB Rep. Dec. 858, *Cornwall Spinners*, (*supra*) and *Sparton Tool & Mould Ltd.*, [1975] OLRB Rep. June 469.)

In cases where the Board concludes that there exists a firm plan for an imminent build-up in the number of employees, the Board will generally direct the taking of a representation vote at the point where fifty per cent of the anticipated total number of employees is employed.

11. In the *Marley Roof Tiles* case, [1984] OLRB Rep. March 511, the Board departed somewhat from its established practice. In that case, the applicant union had filed evidence of membership on behalf of all 15 employees in the bargaining unit on the date the application was filed. Excluding certain employees who were to be hired on a temporary basis only, the bargaining unit was projected to increase to 39 employees. Rather than direct the taking of a representation vote at the point when 20 persons were employed within the bargaining unit, being the halfway point to the projected final employee complement, the Board, on the basis of the union's existing support, decided to certify the union outright. The reasoning of the Board was as follows:

13. ... As indicated in the above excerpt from the *F. Lepper & Son Ltd.* case, the Board generally takes the position that a group of employees is sufficiently representative if it includes fifty per cent of the expected total number of employees. In the instant case, the fifty per cent point is projected to be reached at some point during the month of March, 1984 when the respondent hires the twentieth bargaining unit employee. Accordingly, if the Board were to follow its normal practice, it would consider the wishes of a majority of employees at that point in March when twenty employees were employed in the bargaining unit. Generally, this would be done by way of a representation vote. Given the facts of this case, however, we are satisfied that no such vote is required. Presumably, of the twenty bargaining unit employees projected to be employed in March, fifteen of them will be the same employees who were in the bargaining unit on the application date. All of these fifteen employees are members of the applicant. Accordingly, even when half the total projected number of the employees are employed in the bargaining unit, it appears reasonable to conclude that over fifty-five per cent of them will be members of the applicant union. In these circumstances, we believe the current employees to be sufficiently representative for the purposes of this application. Accordingly, we are not prepared to direct the taking of a representation vote or to postpone certification of the applicant.

This reasoning in the *Marley Roof Tiles* case was adopted in a somewhat similar fact situation in *Brick Brewing Co. Limited*, [1985] OLRB Rep. Nov. 1557.

12. The Board heard no evidence with respect to the planned build-up of employees.

Rather, counsel for the respondent set forth his understanding of the planned build-up and counsel for both parties then made their submissions on the assumption that the facts outlined by respondent's counsel were correct. The applicant, however, reserved the right to require that the respondent actually lead evidence to establish the facts as outlined by respondent's counsel. According to respondent's counsel, the respondent commenced operations in January of 1985 with five employees. By December of 1985, the number of employees had risen to approximately 40. By the date of the filing of the application there were 70 employees, a figure which had increased to 98 as of the date of the hearing in this matter. According to the respondent's counsel, the respondent has firm plans to increase the number of bargaining unit employees to 158 by the end of June 1986. Counsel filed a written document with the Board which outlines in some detail the respondent's projected manpower requirements. This document indicates that the respondent plans to employ 156 employees by the end of June 1986. No one addressed the difference between this figure and the 158 employees referred to by counsel.

13. Prior to the date of the hearing in this matter, the number of employees in the bargaining unit had already passed the halfway point to the total projected work force. If we were to assume that none of the new employees were union supporters, and that all of the employees who were union members on the terminal date were still in the respondent's employ at the halfway point, the applicant's membership support at that point would have been 51 out of 78 or 79 (depending whether the final employee complement is expected to be 156 or 158), which is approximately 65 per cent. If we were to use the same assumptions with respect to the date of the hearing, however, the union's support would have dropped to 51 out of 98, or approximately 52 per cent.

14. The assumption that individuals who were union members on the application date would still be in the respondent's employ as at the halfway point to the final employee complement was challenged by the respondent. According to the respondent, between the application date and the hearing date, eight employees had left the respondent's employ. The respondent contends that at least some of these employees were likely to be union members. (It is of some interest that if the total projected employee complement is to be 156 as opposed to 158, then even if all eight employees who left were union members, and none of the newly hired employees joined the union, over 55 per cent of the employees at the halfway point would still have been union members.) For its part, the applicant contends it is unfair to assume that while the number of employees increases, the number of employees supporting the union will remain the same. Indeed, at the hearing, union counsel made reference to seven "lost" membership cards filed by the applicant prior to the terminal date. These cards bear the signatures of individuals who were not on the list of employees in the bargaining unit as at the application date. Union counsel contended that the individuals in question had been hired by the respondent subsequent to the application date, and had signed membership cards in the applicant trade union prior to the terminal date. Further, subsequent to the hearing, the applicant filed evidence of membership on behalf of 23 persons it claimed had been hired into the bargaining unit subsequent to the terminal date of the application and who had then joined the applicant.

15. As indicated above, we have set the terminal date as the time for the purpose of ascertaining membership under section 7(1) of the Act. Our use of the terminal date is in line with the Board's general practice in such matters and reflects section 73(1) of the Board's Rules of Procedure which provides as follows:

73.-(1) *Evidence of membership in a trade union* or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union *shall not be accepted by the Board on an application for certification* or for a declaration terminating bargaining rights *unless the evidence* is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) *is filed not later than the terminal date for the application.*

(emphasis added)

To accept the membership evidence filed by the applicant subsequent to the terminal date would be contrary to section 73 of the Rules. In addition, to abandon the use of the terminal date as the date for filing membership evidence even in a build-up situation would, in this and other proceedings, cause uncertainty as to when new membership evidence would be considered. Presumably if a union could keep filing membership cards after the terminal date, employees could also keep filing statements indicating that they had changed their minds about union representation. Rule 73 provides a fixed point of reference in this regard, and we are satisfied we should follow the dictates of the Rule and not consider membership evidence filed after the terminal date.

16. The fact that we decline to accept additional membership evidence does not mean that the Board is blind to the possibility that, as in this case where there is an expanding work force, a trade union seeking to organize that work force will seek to persuade new employees to join the union. We also recognize that some individuals who were employed as at the application date may leave a company's employ prior to the halfway point to the final employee complement, and that some of these employees may be union members. It is also quite possible, however, that some of their replacements will become union members. In our view, when the Board is deciding whether, in the exercise of its discretion, it should direct the taking of a representation vote in situations where a trade union has satisfied the statutory requirements for certification, it is appropriate to assume that as the employee complement on the application date "turns over", the relative proportion of employees who are union members will likely remain constant. In the instant case, that leads us to conclude that at the halfway point to the total projected employee complement, the union likely had membership support among approximately 65 per cent of the employees. In these circumstances, we do not believe that this is an appropriate case in which to direct the taking of a representation vote.

17. The respondent also contends that it would not be appropriate to certify the applicant outright because not all of the planned classifications of employees were actually occupied by employees as of the application date. On the basis of the information supplied by the respondent, it appears that of the planned 13 classifications, 9 were occupied on the application date. The other 4 classifications would, at the end of the build-up, have a combined total of 21 employees. In our view, it is not necessary that all classifications be occupied before a union is certified outright. Rather, in a build-up situation, the Board is concerned that a

representative sample of classifications be occupied. In this regard, it is noteworthy that even where all classifications of employees are present, nothing in the Act requires that a trade union have support among employees in each of the classifications. Given all of these considerations, we do not believe, in the circumstances of this case, that the lack of employees in certain classifications should cause us to direct the taking of a representation vote.

18. The applicant has met the statutory requirements for automatic certification. We are not satisfied that this is a case where the Board should exercise its discretion and direct the taking of a representation vote. Accordingly, a certificate will issue to the applicant.

2183-85-R Bakery, Confectionary and Tobacco Workers International Union, Local 181, Applicant, v. **Dough Delight Ltd.**, Respondent, v. Group of Employees, Objectors

Membership Evidence - Practice and Procedure - Two collectors collecting 80 percent of cards filed - Misleading Form 9 declarant about non-pay regarding two cards - Board not satisfied any cards filed by collectors reliable - Fact that non-pay came to light due to unlawful conduct of employer irrelevant to issue of membership evidence

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members P. J. O'Keeffe and R. W. Pirrie.

APPEARANCES: James Hayes, Roman Stoykewych, Domenic Ricci and Sean Kelly for the applicant; R. C. Fillion, Paul Young, D. Daniels, and S. Ajmera for the respondent; Richard Morrow for the objectors.

DECISION OF THE BOARD; May 20, 1986

1. This is an application for certification in which a question arose whether certain employees had paid a dollar as stated in membership documents filed with the Board in support of the application. Each of those documents is in form of a card with two distinct parts: an application for membership signed by the applicant and a receipt and acknowledgement of payment signed by the collector and the applicant. The latter part of the card is in this form:

\$1.00 Initiation Fee
Received by _____
Signature of Collector

I hereby certify that
I paid the above amount

Date _____, 19_____
Signature of Applicant

As the Board's Rules of Procedure require, the applicant filed a declaration concerning membership documents in Form 9, the third paragraph of which reads:

“(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on a account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, **EXCEPT IN THE FOLLOWING INSTANCES:**”

No exceptions are noted below this paragraph. The declaration is signed by Joe Potok, the President of the applicant.

2. Mr. Potok did not solicit cards himself. All of the cards were collected by employees

of the respondent. The major collectors were S. Singh and M. Bains - between them they collected over four-fifths of the cards submitted by the applicant.

3. One of the cards Bains collected was signed by A. Assoweh. Assoweh did not pay a dollar; another employee paid a dollar for him. When Bains handed in this card he told Potok that he had not received a dollar directly from Assoweh. Potok then told Bains that he should not have collected the card in that manner. Bains says Potok gave him no further instructions, however, and kept the card. Potok says he gave the Assoweh card and accompanying dollar back to Bains and instructed him to go back and collect a dollar directly from Assoweh. In either event, Bains did not go back and collect a dollar from Assoweh, and the Assoweh card was among those filed with the Board. On either version of the transaction, there can be no doubt that Bains and Potok both knew that the circumstances of the collecting of the Assoweh card were improper, and the presence of that card among cards submitted to the Board was the result of a deliberate attempt to mislead by either Bains or Potok. If Bains' evidence of this transaction with Potok were correct, that would indicate that Potok deliberately misled the Board by submitting a card knowing it had been collected in a manner inconsistent with the representation he made by signing the Form 9 declaration without noting exceptions in paragraph 3. If Potok's version of the transaction is correct, then Bains must have resubmitted the card to Potok on a subsequent occasion and lied to Potok when Potok then asked whether a dollar had been collected directly from each of the persons whose cards were then being submitted. We accept Potok's version, since it makes little sense for Potok to have told Bains that the card was collected improperly and then to have done nothing about it.

4. One of the cards Singh collected was signed by A. Salad. Salad did not pay Singh a dollar. The dollar Singh put with Salad's card came from another employee who was present at the time Salad handed his signed card to Singh. When Singh later handed this and other cards to Potok, Potok asked him whether he had collected a dollar from each of the signers. Singh answered "yes", knowing that this was not true with respect to Salad's card. There is no explanation whatsoever of Singh's failure to do as Bains did and bring the circumstances of his collection of the Salad card to the attention of Potok.

5. This is an application for certification to which section 7 of the *Labour Relations Act* ("the Act") applies. That section requires the Board to determine what percentage of persons employed in the appropriate bargaining unit were members of the applicant trade union on December 9, 1985, the terminal date fixed for this application, which the Board determines under section 103(2)(j) to be the time for ascertaining membership under subsection 7(1). The Board's Rules require that evidence of membership be filed in documentary form, and section 111 of the Act provides that such membership documents are for the exclusive use of the Board and cannot be disclosed without the Board's consent. Because of the weight which it will ordinarily give to membership documents, the Board requires assurances that they are reliable evidence of their contents, and this is the purpose of the Form 9 Declaration. The Board's standards with respect to disclosure of irregularities have been expressed in any number of decisions, of which the following passage from *Valley Transportation Company Limited*, [1963] OLRB Rep. Nov. 448, is representative:

It need hardly be pointed out, that it would be impossible for the Board to interview each and every employee in respect of whom evidence of membership is filed in applications for certification. Further, whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union are, except in the special

circumstances where the Board consents to their disclosure, matters which are protected from disclosure by the provisions of section 83 [now 111] of the Act. By the very nature of things, therefore, the Board must rely heavily and almost entirely on documentary evidence when considering the facts relied on as constituting proof of the union's membership. As the documents submitted as evidence of membership are not subject to any examination by the other parties to the proceedings, the Board must be most circumspect and meticulous in its examination and acceptance of them. The Board must expect and insist that persons who file applications for membership cards and receipts and Form 9 as evidence of membership, take all necessary precautions and care to ensure that the information contained therein is true and accurate. The Board is entitled to demand the highest standards of integrity, disclosure, and accuracy on the part of those who submit such evidence and where undisclosed inaccuracies of material facts are later brought to its attention, to take a strict view of them.

See also *Webster Air Equipment Company Ltd.*, (1958) 58 CLLC ¶18,110; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan 738; and, *Collingwood Shipyards*, [1967] OLRB Rep. June 246. Although the Board's decisions in this area are often couched in admonitory language, it is important to remember that the Board's object in any inquiry into undisclosed irregularities is not to punish non-disclosure but to determine what weight can be given to the impugned membership documents and, in light of the non-disclosure, to the other membership documents filed with them and the supporting Form 9 declaration, as evidence of membership.

6. Here we have two collectors who, together, collected over 80% of the membership evidence submitted with this application. Both knew it was important that a dollar be collected *directly* from the applicant. Both knew that this is what the Form 9 declarant was asking them when he made his inquiries, and it is clear that each of them deliberately misled the Form 9 declarant with respect to at least one card.

7. The Board has no jurisdiction to grant outright certification unless it "is *satisfied* that more than 55% of the employees in the bargaining unit are members of the trade union" at the relevant time. It has no jurisdiction to order a representation vote for the purpose of resolving an application for certification unless it "is *satisfied* that not less than 45% ... of the employees in the bargaining unit are members of the trade union" at the relevant time. Although the percentage requirements are different, the requirement that the Board be satisfied with the evidence of membership is the same for a vote as for outright certification. In both cases, the evidence relied upon must be supported by a reliable Form 9. In its application to the membership evidence collected by Singh and Bains, the reliability of the Form 9 declaration depends entirely on the reliability of the reports they made to Potok. In view of their prominent roles in the organizing campaign and their having knowingly and deliberately misled Potok on at least one occasion each, we are not prepared to find that their reports to him were sufficiently reliable or trustworthy as to satisfy us that the pieces of paper they signed as collectors constitute evidence of membership which complies with the statutory definition in clause 1(1)(l) of the Act. Accordingly, because most of the cards were collected by one or other of those 2 collectors, we are unable to find that not less than forty-five percent of the employees in the unit were members of the applicant at the relevant time.

8. The instances of "non-pay" ultimately established by the Board's inquiry came to light as a result of the actions of a person acting on behalf of the employer - actions which counsel for the applicant says constitute an unfair labour practice. He says this should be taken into account, and that anything short of outright certification would amount to a reward to the employer for these unfair labour practices. We note that the alleged unfair labour practices occurred after the membership evidence in question had been collected and submitted to the

Board. The Act clearly defines in section 8 the circumstances in which the occurrence of employer unfair labour practices can diminish the standard or quantity of membership evidence which an applicant trade union must otherwise establish in order to be granted either a representation vote or outright certification. The applicant has not invoked that section. We are focusing solely on the reliability of membership evidence, and not on the punishment or reward either of the trade union or of the employer. We cannot ignore facts relevant to a matter which we have a statutory duty to decide merely because of the way their existence was discovered and brought to our attention. We are not satisfied that there is reliable membership evidence in sufficient quantity to grant outright certification or order a vote and so have jurisdiction to do neither. If the respondent or someone acting on its behalf has committed some unfair labour practice, a question we are not called upon to decide, then the appropriate response may be sought from the Board and, if the applicant is so advised and receives Board consent, the court.

9. Our decision to reject membership evidence collected by Singh and Bains is dispositive of this application and makes it unnecessary to consider the adequacy of Potok's inquiries with respect to sub-collectors and the weight which would have been given to the other membership evidence submitted, because even if it were given full weight, that other evidence was quantitatively insufficient. We do wish to note, however, that nothing in the evidence we heard leads us to conclude that the applicant or its President, Joe Potok, has made any conscious attempt to mislead the Board.

10. Accordingly, this application is dismissed without a bar and without prejudice to any subsequent application based on fresh membership evidence.

2763-85-R Fraternite Inter-Provinciale des Ouvriers en Electricite (F.I.P.O.E.),
Complainant, v. **Dustbane Enterprises Limited** (Dustbane Products Limited),
Respondent, v. Group of Employees, Objectors

Trade Union - Trade Union Status - Steps for formation of union not taken at single meeting but at separate meetings on different dates - Procedure not defective - Whether initially faulty procedure can be corrected by subsequent steps - Whether constitution discriminatory - Whether applicant having viable presence in Ontario

BEFORE: Robert J. Herman, Vice-Chairman, and Board Members J. P. Wilson and A. R. Foucault.

APPEARANCES: L. N. Gottheil, Pierre Lecompte, Ronald Gagnon and Leonard Whitton for the applicant; Walter T. Langley and Michael Gerrior for the respondent; Donald White for the Group of Employees.

DECISION OF THE BOARD; May 30, 1986

1. Four proceedings were previously consolidated, consisting of an application for certification and three complaints filed pursuant to section 89 of the *Labour Relations Act*. In a decision of the Board issued May 6, 1986, the three section 89 complaints were withdrawn with leave and various directions were made with respect to the four bargaining units in the certification application. That decision also noted that the parties had led evidence and made submissions with respect to the status of the applicant, F.I.P.O.E., as a "trade union" within the meaning of section 1(1)(p) of the *Labour Relations Act*, and further noted that the Board had reserved its decision on this issue, which decision we hereby deliver.

2. The applicant argued that it was a "trade union" within the meaning of the Act on two grounds. First, the applicant referred to a decision of the Board in *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472, where the Board summarized the steps that ordinarily are to be taken by an organization wishing to establish its status as a trade union. Paragraph 10 of that decision reads as follows:

The following steps should be taken by an organization wishing to establish its status as a trade union within the meaning of the Act.

- (a) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such meeting should be admitted to membership;
- (4) the constitution should be adopted or ratified by the vote of said members;
- (5) officers should be elected pursuant to the constitution.

3. The applicant submitted that it had met this test and according to standard Board jurisprudence ought to be found to be a trade union within the meaning of the Act.

4. Second, quite apart from whether the steps set out in *Local 199 U.A.W. Building Corporation* (supra) have been followed, the applicant submitted that it had taken the correct steps according to Quebec law, as set out in the *Professional Syndicates Act* R.S.Q. 1977, c.S-40, as amended, and by virtue of section 9 of that statute the Board must find that F.I.P.O.E. is a "trade union".

5. The applicant was first formed in October of 1972, when a group of employees in Quebec, until that time represented by the International Brotherhood of Electrical Workers (IBEW), broke off from that organization as a result of a dispute concerning their pension fund. Various meetings took place throughout the Province of Quebec, as the then IBEW members considered whether they ought to break away and form their own organization. A meeting was organized and held on October 13, 1972, for the purpose of meeting with officers of the IBEW, and at the same time for the purpose of setting up the applicant, should it be deemed necessary by those in attendance. At that meeting it became apparent that a great number of members felt they could not continue to be represented by IBEW, and they sought to form their own organization, the applicant. At that same meeting the first executive officers of the applicant were elected, on an interim basis, and those in attendance proceeded to adopt a constitution and regulations. None of the future members of F.I.P.O.E. joined the applicant at that meeting.

6. During the forty day period following November 1, 1972, meetings were organized throughout the Province of Quebec during which approximately 8,000 employees joined the applicant as members. The great majority of these employees had formerly been members of the IBEW. The evidence suggests that the constitution adopted in October of 1972 was sent to employees before they attended these meetings, at which they both officially became members of the applicant and approved the constitution.

7. On the 20th of May, 1974 at a meeting of the entire membership, a new executive was elected by the membership. On the 18th of May, 1975 the applicant convened its First General Congress, at which a revised constitution was adopted by the members in attendance, and new elections were held for the new executive officers. In November, of 1977 the Second General Congress was held by the applicant, and the constitution further amended by the membership to reflect the following geographical jurisdiction of the applicant:

"The territorial jurisdiction of the brotherhood shall extend to the whole territory of the Province of Quebec, and to every other province or territory of Canada, in accordance with the laws and statutes of each province and territory. (Constitution, chapter 3, section 1(b))."

8. At that same Congress the trade jurisdiction of the applicant was amended to include, *inter alia*, "every other wage earning employee, exercising any trade or occupation whatever, whom the meeting of members or the management office shall see fit to admit" (Constitution, Chapter 3, Section 1(a)).

9. As of the date of this application, F.I.P.O.E. represented over 10,000 employees in the Province of Quebec, including those in industrial, non-construction, bargaining units and industries. The applicant has offices scattered throughout the Province of Quebec, including one in Hull, across the river from Ottawa. The instant proceeding is the first in which the applicant has applied to represent employees working in Ontario and subject to the Labour Relations Act.

10. Section 1(1)(p) of the Act contains the following definition:

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.”

11. As an accurate summary of the nature of our enquiry under this section, we adopt the Board’s comments in *La-Z-Boy Canada Limited*, [1981] OLRB Rep. April 460, where it stated, at paragraph 12 therein:

“In determining whether an applicant is a trade union, the Board must address itself to the question: “Is the applicant a trade union as defined by the Act?” (see *CSAO National (Inc.)*, (1972) 2 O.R. 498 (C.A.)). Having regard to the statutory definition set forth above and the overall scheme of the Act, an entity seeking to establish that it has status as a trade union must, as a necessary first step, establish that it is an “organization of employees” (see *Armour Associates*, [1976] OLRB rep. March 117). To be found to be an “organization” within the meaning of section 1(1)(n), the applicant must prove that it is a viable entity for purposes of collective bargaining, by establishing that it has a written constitution, by-laws, charter or other documentary evidence which prospective members could inspect in order to determine whether or not the organization is one which they would wish to join, and by establishing that it has officers who can carry out its objects (see, for example, *The Toronto Blizzard Soccer Club*, [1979] OLRB Rep. May 449; *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797; *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472; *Bauer Bros. Company*, [1977] OLRB Rep. March 159; and *Air Master of Canada Limited*, [1973] OLRB Rep. Oct. 540.).”

12. There is no dispute as to whether the applicant is an “organization of employees” nor as to whether one of its purposes includes the “regulation of relations between employees or employers”, and in any event we find based on the evidence that the applicant does meet these tests. The respondent suggests that the applicant does not have and ought not to be found to have status as a “trade union” for three reasons. First, the applicant did not take the proper steps, in the proper order, in drafting and adopting a constitution, having the employees become members in the applicant, and subsequently adopting and ratifying the constitution. Second, the constitution contains provisions of a discriminatory or otherwise offensive nature and the applicant cannot therefore be found to be a “trade union”. Third, the respondent suggests that the applicant would not be a viable entity for purposes of collective bargaining, by virtue of its lack of presence in Ontario and therefore its inability to properly serve its members and the employees it represents.

13. When the events which occurred in October and November of 1972 are taken together, and in context, it appears to us that the applicant has satisfied the test as set out in *Local 199 U.A.W. Building Corporation* (supra). The applicant was formed during the meeting on October 13, 1972, and at the same time a constitution and regulations were adopted. Although employees did not join and become members at that same meeting, in meetings throughout the province which followed in the two month period after October 13, 1972, employees were presented with the constitution, subsequently became members of the applicant, and thereupon approved the constitution. At that time an interim executive, elected at the October 13, 1972 meeting, was in office. That executive was replaced by an executive duly elected by the members at a meeting held on the 20th of May, 1974. When we look at all these activities and meetings, we are satisfied that the applicant did take the necessary and

proper steps to acquire status both as an “organization of employees” and as a trade union within the meaning of the Act. It is not fatal that these steps did not take place at one meeting, attended by all members, but rather occurred in separate meetings occurring on separate dates. When what occurred is viewed in its entirety, it is clear that the constitution was drafted, and was subsequently placed before several meetings of employees for approval, where the constitution was both approved and the employees attending such meetings were subsequently admitted to membership. It is equally clear that subsequent to these steps, on the 20th of May, 1974, officers were elected pursuant to those constitutional provisions.

14. Even if we are incorrect in our view that the applicant had followed the proper steps, at least by the time of the election of the new executive in May of 1974, we find that the First General Congress in May of 1975 corrected any deficiencies. At that Congress, attended by members from throughout the province, a new constitution was placed before the membership, was subsequently adopted and ratified and elections were held to elect a new executive. The respondent concedes that all the proper steps were followed at the First Congress, but suggests that an organization cannot be found to be properly a “trade union”, within the meaning of the Act, unless the initial constitution and procedures were correct in all respects. We do not accept that proposition. Where the initial steps taken by an organization are faulty in some respect, any such deficiency may be corrected by subsequent procedures taken by the same organization. If it were otherwise, then an organization which inadvertently omitted or wrongly performed a given step in the procedure, would forever be precluded from correcting their mistake and forever precluded from becoming a “trade union”. As the Board stated in *The University of Ottawa* [1975] OLRB Rep. Sept. 694, at paragraph 2:

“It must be said that the evidence concerning the initial adoption of a constitution is not as full and complete as it might have been. For example, while Professor Vaillancourt testified that the 1957 constitution was the original constitution of the organization, no detailed evidence was given as to the manner, or even the specific date, of its adoption. However, the uncontradicted evidence was that the original 1957 documents was amended, by the majority vote of the membership at large, on four subsequent occasions: March 17, 1964, March 23, 1972, January 28, 1975 and April 24, 1975. Moreover, all of the documents subsequent to the one bearing the handwritten notation “1957 Constitution” bear the notation “adopted March 17, 1964”. It would appear, therefore, that a 1964 constitution (complete, and fundamentally different in content from the 1957 document) was adopted on March 17, 1964. However, even if the notation is insufficient to establish adoption on that latter date, we have the evidence that each of the subsequent amendments was accepted by a majority vote of the membership at large. The adoption of such amendments, and the continued and uninterrupted operation of the organization under the constitution, as amended, is consistent with the finding that the applicant had, at the time of the application, a constitution containing all of the essential ingredients of an “organization”. i.e., objects (including the securing of “adequate conditions of employment and tenure”), officers, membership qualifications, fees, provision for meetings, amending procedures, etc. As to the significance of subsequent acts of ratification in curing or clarifying matters of status, reference may be made to *Gilbarco Canada Ltd.* (1971) OLRB Rep. 155. Accordingly, for all of the above reasons, we find the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

15. The second concern raised by the respondent revolves around certain provisions in the constitution which the respondent suggests prevent the Board from finding that the applicant is a trade union. The respondent points to the following two provisions of the applicant’s constitution:

Chapter 3, Section 2

The entry or initiation fee and the union dues may be modified at any time by the duly convened general meeting of members, following a secret ballot and after approval of the

Ministère des Consommateurs, Cooperatives et Institutions Financières (Ministry of Consumer Affairs, Cooperatives and Financial Institutions).

Chapter 13, Section 9(a)

Powers

The Executives of the units have the power to admit as members all persons who have signed a membership application, and have paid the initiation fee of \$1.00 and the union dues of \$1.00, or who will sign their membership application and will pay their initiation fee and union dues before the petition for accreditation is filed.

The Executives of the units have the power to authorize the filing of a petition for accreditation, to take all other necessary or useful steps related to the filing of the petition, and to authorize one or more persons to sign all documents concerning the petition for accreditation and to make the necessary representations to the Ministry of Labour and Manpower.”

16. After the decision of the Court of Appeal in *CSAO National (Inc.)* [1972] 2 O.R. 498, the Board will not deny an organization status as “trade union” only because provisions of the constitution might be discriminatory. The Board must be satisfied, rather, that such provisions do not affect whether that organization is a “viable entity for purposes of collective bargaining”. Constitutional clauses which do not cause the Board concern with respect to that question are internal union affairs and not properly matters to be considered by the Board in addressing the issues set out in section 1(1)(p) of the Act. The sections of the constitution referred to by the respondent do not affect our conclusion that the applicant is a viable entity for purposes of collective bargaining.

17. In any event, the constitutional provisions referred to do not appear to discriminate against Ontario members of the applicant. Section 2(e) of the constitution refers to approval that must be obtained from a Quebec Ministry, but this approval must be obtained in all cases, regardless of the province of residence of members voting for the fee changes. Section 9(a) of Chapter 13 of the constitution, similarly refers to a particular situation where the applicant may need to make representations to a particular Quebec Ministry. The respondent suggests that this also is a discriminatory provision, in that members in the Province of Ontario are treated differently from members within the Province of Quebec. The provision in question does not, however, purport to treat members differently depending upon their province of residence or employment. Both because we consider such constitutional provisions irrelevant to our inquiry, except insofar as they reflect on the applicant’s viability to represent employees, and because we consider the provisions in question do not discriminate amongst members, we do not find that the constitution precludes a finding that F.I.P.O.E. is a trade union.

18. Finally, while conceding physical presence is not necessary, the respondent suggests that the applicant does not have a “viable” presence within the Province of Ontario, and therefore is not a “viable” entity for purposes of representing employees and members within the Province of Ontario. In *Rockwell International Corporation*, [1981] OLRB Rep. June 780, the Board stated as follows:

17. ...The decision in the *Boulton* case was considered recently by the Board in *La-Z-Boy Canada Limited*, [1981] OLRB Rep. April 460. In that case the Board declined to follow the reasoning of the *Boulton* case on the basis that when the Board determines whether or not an organization has the status of a trade union, the Board must look to see whether or not it fits the definition of a trade union set out in the Act, not whether the organization has established a presence in Ontario. In reaching this determination the Board stated as follows:

It is firmly established that the Board can certify an international union which has its head office outside of Ontario (see *Ford Motor Co. of Canada Ltd.*, 46 CLLC ¶16,401, and *Metal Textile Corporation of Canada Limited* [55 CLLC ¶18,016]). Indeed, section 1(1)(n) specifies that "trade union"...includes a provincial, national or international trade union...". There is nothing in the Act which either expressly or implicitly requires an international trade union to have a permanent office in Ontario or to have officers or representatives based in Ontario. Section 77(1) of the Act merely requires every trade union with members in Ontario to file with the Board a notice in the prescribed form giving the name and address of a person resident in Ontario who is authorized by the trade union to accept on its behalf service of process and notices under the Act. Far from requiring a substantial "presence" in Ontario, that provision amounts to a legislative recognition of the fact that the representatives of an international trade union may well be based in another jurisdiction where it might be difficult to effect service of process and notices under the Act. Accordingly, in view of the *CSAO National* case, the provisions of section 1(1)(n) and the other provisions of the Act, the Board is not entitled to consider whether an entity which claims to have status as a trade union has established a "presence" in Ontario or "subsists in any true sense within the province"; the Board can only determine whether or not the applicant is a trade union as defined by the Act. Therefore, we agree with counsel for the applicant that the *Boulton* case cannot be considered to be authoritative with regard to the issue of trade union status.

18. We agree with the basic reasoning of the Board in the *La-Z-Boy Canada Limited* case. A union local is not deprived of the status of as [sic] trade union in Ontario simply because it is headquartered outside of the province. However, the Board in determining whether an organization is "an organization of employees formed for purposes that include the regulation of relations between employees and employers" must be satisfied that the organization is a viable organization capable of performing the functions of a trade union under the Act. See: *University of Ottawa*, [1981] OLRB Rep. Feb. 232. In our view, for an organization to be a trade union for the purposes of the Act, it must be capable of carrying out the functions of a trade union in Ontario. On the evidence before us, we are satisfied that although Lodge No. 126 has its headquarters in Bellwood, Illinois, the Lodge has structured its affairs so as to allow it to carry out the function of a trade union in Ontario...."

19. While the applicant's presence within the province does not include, at the current time, a physical office, the applicant has led evidence which establishes that it has a permanent office in Hull, immediately across the river from the Regional Municipality of Ottawa-Carleton, where the respondent's place of business is located. It is also clear from the evidence that the applicant has conducted business for a significant number of years throughout the Province of Quebec, and clearly has a viable presence throughout that province. When these factors are taken together, it simply cannot be maintained that the applicant does not have a viable presence within this province. Indeed, the Board notes that the office of the applicant which would serve employees of the respondent is closer to the respondent's place of business than are offices of other unions and the employees they represent. The only factor which suggests that the applicant has no "presence" within the province is that its office is located in the Province of Quebec. That fact alone does not lead us to conclude that the applicant has no "presence" within the province.

20. In all the circumstances and for the reasons given above, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. In light of this conclusion it is unnecessary for the Board to comment upon the applicant's alternative submission, relying on the provisions of the Quebec *Professional Syndicates Act*.

21. This matter is referred to the Registrar.

CONCURRING OPINION OF BOARD MEMBER J. P. WILSON;

1. While I agree with the Board finding that F.I.P.O.E. is a trade union within the meaning of the *Labour Relations Act*, certain aspects of the application leave me uncomfortable and I feel I must express certain reservations.

2. Previous decisions of the Board have constrained us into finding whether or not F.I.P.O.E. is a trade union as defined by the Act and prohibited us from looking behind the application to consider how the applicant could or may conduct its affairs in the Province of Ontario.

3. Certain provisions in the F.I.P.O.E. Constitution cause me some misgivings, for example Chapter VIII, Article 5 which defines the sweeping powers of the General Manager - Financial Secretary; and Chapter XXVI which leaves to "ancillary terms" the operation of construction agreements. Since F.I.P.O.E. is an organization grounded in the construction industry as a craft union, I am puzzled by the omission of concrete reference to construction.

4. However, in considering the problems that could arise, I feel that many provisions in the Act will serve as safeguards for prospective employees and employers.

2521-85-U The Association of Allied Health Professionals: Ontario, Complainant, v. Etobicoke General Hospital, Respondent

Change in Working Conditions - Hospital Labour Disputes Arbitration Act - Unfair Labour Practice - History of incorrect payment for statutory holidays under collective agreement - Employer correcting error during freeze period - History constituting privilege and prevailing over term in agreement

BEFORE: Judge R. S. Abella, Chairman, and Board Members W. G. Donnelly and K. Rogers.

APPEARANCES: Sandra Nicholson on behalf of the applicant; Paula M. Rusak, John Walker, and H. Issac for the respondents.

DECISION OF THE BOARD; May 22, 1986

1. This is a complaint that the grievors have been dealt with by the respondent contrary to section 13 of the *Hospital Labour Disputes Arbitration Act*.

2. The parties have had a collective bargaining relationship since 1975. The last collective agreement between the parties terminated on December 31, 1983. The parties were unable to conclude a renewal of the collective agreement. They met with a Conciliation Officer as a result of which a "no collective agreement" report was issued on June 14, 1985. The matter was referred to a Board of Arbitration and heard in October, 1985. No award had issued as of the hearing of this complaint.

3. The four grievors work in the Crisis Intervention Centre of the Etobicoke General Hospital. Two work part-time and two work full-time. The Centre operates 7 days per week on rotating shifts.

4. Each of these employees since their hirings in 1984 and 1985 has been paid for designated holidays in a manner at variance with Article 16 of the Collective Agreement. When hired, this manner of payment was expressed to be part of their employment. In the latter part of 1985, after the Board of Arbitration hearing was concluded, these employees were advised that they would no longer be paid for designated holidays, that there would be a change in policy in how these days would be paid for, and that section 16.03 of the Collective Agreement does not require the Hospital to pay for these holidays. Each employee was asked to take days off without pay before the end of March, 1986 to compensate the Hospital for having paid them for Christmas and Boxing Days.

5. Section 13 of the *Hospital Labour Disputes Arbitration Act* states:

Notwithstanding subsection 79(1) of the *Labour Relations Act*, where notice has been given under section 14 or 53 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any

term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated. R.S.O. 1970, c.208, s.10.

6. John Walker, the Assistant Administrator in charge of professional services at Etobicoke General Hospital stated that to the best of his knowledge, the practice of paying employees in the Crisis Intervention Centre for statutory holidays has been ongoing for at least the 2 1/2 years he has been in his position. In July or August, 1985, he discovered to his surprise when investigating a "large and growing variance" between the actual expenses and the budget in the salary line of the Crisis Intervention Team's Salary Statements, that employees were being paid for statutory holidays improperly. Because this, in his view, was contrary to Article 16.03 of the collective agreement, in late November or early December he informed the union of the situation and instructed the Department Head to inform the employees that in future the terms of the collective agreement would be applied.

7. Article 16.03 of the expired collective agreement states:

16.03 An employee who is required to work on a designated holiday will be given an unpaid day off at a time that is mutually acceptable to the Hospital and the employee. No more than three (3) such days may be accumulated.

The respondent argues that the section 13 "freeze" provision ensures that the pre-existing rights of an employer and union are frozen. Since the employer had the right, prior to the freeze, to correct the error that resulted in overpayment, that right continues during the "freeze" provisions.

8. As previous Board jurisprudence has shown, the purpose of "freeze" provisions such as section 13 is to maintain a "pattern of business" between the employer and union, requiring the employer to continue to operate its workplace in accordance with its pattern prior to the "freeze". Although the specific terms of a pre-existing collective agreement are instructive in ascertaining what constitutes a prior pattern, they are not necessarily determinative. Where, as in this case, both during the subsistence and after the expiration of the collective agreement, employees enjoy the benefit of a term of employment and where, moreover, they are hired on the express understanding that this term exists, it is not open to an employer to change this term during the "freeze" period simply because it discovers and wishes to correct an oversight. In these circumstances, where there is a conflict between a provision in the collective agreement and an historic pattern of payment, the pattern prevails during the "freeze". The reasonable expectations of the employees, based on their being hired on the express understanding that the term of employment in question existed and based on the practice of the Hospital to pay them this way, created a "privilege". This privilege is preserved by section 13 and prevails over the Hospital's right to correct an oversight in the enforcement of an expired collective agreement.

9. For all of the above reasons, we find that the respondent violated section 13 of the *Hospital Labour Disputes Arbitration Act* in the manner described above. The respondent is hereby directed to compensate the grievors for all losses sustained as a result of that violation and reinstate its previous payment and scheduling practices regarding statutory holidays. In making its decision, the Board reviewed the following cases: *The Metropolitan Toronto Civic Employees' Union Local 43, Canadian Union of Public Employees v. The Municipality of Metropolitan Toronto, M. Teplitsky, Q.C., Murray Tate and M. Patrick Moran*, (1985), 50

O.R. (2d) 618; *Local 304 Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers v. Molson's Brewery (Ontario) Limited, Toronto*, [1977] OLRB Rep. Aug 526; *Ontario Public Service Employees Union v. Oshawa General Hospital, York-Finch General Hospital*, [1985] OLRB Rep. Jan. 98; *A.N. Shaw Restoration Ltd. v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 127*, [1978] OLRB Rep. June 479; *Re Domglas Ltd. and United Glass and Ceramic Workers, Local 203*, (1980), 26 L.A.C. (2d) 94 (Burkett); *Ontario Nurses' Association v. Women's College Hospital*, [1981] OLRB Rep. May 597; *Re United Electrical Workers, Local 512 and Standard Oil Products (Canada) Ltd.* (1971), 22 L.A.C. 377 (Weiler).

10. The Board will remain seized of this matter in the event that a dispute arises concerning the interpretation, implementation or quantification of the Board's order.

DISSENT OF BOARD MEMBER W. G. DONNELLY;

1. I accept the view expressed in the decision in the case of the Ontario Nurses' Association and Women's College Hospital, Board File 2703-80-U dated May 4, 1981. At page 600 paragraph 9 which states in part, "Accordingly it would be wrong to conclude that management is precluded from making changes of any sort during the freeze period because the Board has held that, at the very least, it can continue to exercise it's specific rights under the collective agreement".

2. The Board added in paragraph 11 thereof "There is an express right to do something in the collective agreement and that right may be exercised in the freeze period to the same extent that it could be exercised before the freeze period set in."

3. These statements are clear and unequivocal.

4. The majority decision of the Board in the instant case recognizes, in paragraph 8 thereof, "The Hospital's right to correct an oversight in the enforcement of an expired collective agreement."

1398-83-R; 1399-83-R; 1503-83-M; 0916-84-U International Brotherhood of Electrical Workers, Local 1687, Applicant, v. **F.D.V. Construction Limited**, 515112 Ontario Limited carrying on business as Bluebird Construction, and 556631 Ontario Limited carrying on business as G.P. Construction, Respondents; International Brotherhood of Electrical Workers, Local 1687, Applicant, v. F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction, 556631 Ontario Limited carrying on business as G.P. Construction, and The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Respondents; International Brotherhood of Electrical Workers, Local 1687, Complainant, v. F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction, 556631 Ontario Limited carrying on business as G.P. Construction, William Moffat and Graham Pope, Respondents

Charter of Rights and Freedoms - Constitutional Law - Related Employer - Whether related employer provision contrary to Charter - Whether Board having jurisdiction to deal with charter argument where A.G.'s not given notice - Whether employers having standing to invoke charter rights of employees

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *W. F. Rutherford* and *W. H. Wightman*.

APPEARANCES: *Michael Mitchell*, *Steven Barrett*, *Lou Popovich*, *Gary Bouchard* and *L. Lyman* for the applicant; *Raimo T. Heikkila* and *William Moffat* for F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and William Moffat; *Lorenzo Girones* and *Graham Pope* for 556631 Ontario Limited carrying on business as G.P. Construction; *S.C. Bernardo* and *Eryl Roberts* for The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario.

DECISION OF THE BOARD; May 20, 1986

[Paragraphs 1 to 18 inclusive omitted: Editor]

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19. During the course of the hearings in this matter counsel for FDV and Bluebird raised a preliminary objection regarding the jurisdiction of the Board to deal with the applicant's request for an order under section 1(4) of the Act. This preliminary objection may be stated as follows:

Section 1(4) of the Act which allows the Board to declare that two or more employers may be treated as one for the purposes of the Act infringes the guarantee of freedom of association provided in section 2(d) of the *Canadian Charter of Rights and Freedoms*. Since this infringement cannot be justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society, section 1(4) of the Act is unconstitutional and of no force and effect and thus the Board should refuse to proceed with the applicant's request for an order under section 1(4) of the Act.

The Board has stated in *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261 that there is an obligation on the Board to deal with and determine a constitutional issue which has been raised before it. It was argued by counsel that section 1(4) is discretionary with respect to the issuance of a declaration even though all the statutory preconditions may be present. It was emphasized by counsel that the criteria employed by the Board to exercise its discretion is not contained in the Act. Counsel pointed out that the Board had in fact developed criteria over a series of cases decided over a number of years. Section 2(d) of the *Canadian Charter of Rights and Freedoms* provides that:

Everyone has the following fundamental freedoms:

(d) Freedom of association.

20. Section 2(d) is qualified by section 1 which provides as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Counsel argued that declarations under section 1(4) interfered with the freedom of employees to choose the bargaining agent desired by the majority of employees or to remain non-union. Counsel argued that there was no question that the *Labour Relations Act* does contain limits or infringements other than section 1(4) on the freedom of association enjoyed by employees. However, as viewed by counsel, the key issue was whether a particular limit is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. Counsel relied on a number of authorities and quoted other sections of the Act in support of his argument on the constitutionality of section 1(4) of the *Labour Relations Act*.

21. The applicant referred to section 35 of the *Judicature Act*, R.S.O. 1980, c.223 which provides in subsection 1:

Where in an action or other proceeding the constitutional validity of any act or enactment of the Parliament of Canada or of the Legislature is brought into question, it shall not be adjudged to be invalid until after notice has been given to the Attorney General for Canada and to the Attorney General for Ontario.

The applicant relied on *Butler v. York University and Ontario Labour Relations Board*, (1984) 1 O.A.C. 60 where the Divisional Court refused to hear the applicant's argument that sections 43 and 46 of the *Labour Relations Act* contravene the right to freedom of religion and conscience as set out in section 2(b) of the *Charter*, and so were unconstitutional, on the grounds, *inter alia*, that there was a complete absence of notice to the Attorneys-General as required by section 35 of the *Judicature Act*. Even though counsel for FDV and Bluebird subsequently gave notice to the Attorney General as required by section 35 of the *Judicature Act*, the Board concludes that at the time the constitutional validity of section 1(4) was called into question, the Board was without jurisdiction to adjudicate upon the constitutional validity of the related employer provisions in the absence of proper notice to the Attorneys-General.

22. The applicant also raised another issue with respect to the standing of counsel for FDV and Bluebird to challenge the constitutional validity of section 1(4). The applicant argued that the respondents did not assert that section 1(4) interfered with their constitutionally

protected rights, but rather with the constitutionally protected rights of *others*. The applicant relied on a number of cases where the courts had been reluctant to permit an employer to invoke on behalf of other persons, and in particular, on behalf of employees, rights which did not belong to the employer but did belong to other persons. Having regard to the decision of the Supreme Court of Canada in *Canada Labour Relations Board and Transair Limited*, (1976) 67 D.L.R. (3d) 421 and *Cunningham Drug Stores Limited v. B.C. Labour Relations Board*, (1973) 31 D.L.R. (3d) 459, the Board finds that FDV and Bluebird do not have the standing to raise the constitutional validity of section 1(4) of the Act.

23. However, if the Board is wrong with respect to the requirements of section 35 of the *Judicature Act* and is further wrong with respect to the standing of FDV and Bluebird to raise the constitutional validity of section 1(4), the Board will proceed to deal with the challenge on the basis of its merits. The applicant argued that it was impossible to determine whether any statutory provision infringed upon a right or freedom guaranteed by the *Charter* without a clear understanding of the purpose, operation and effect of the statutory provision in question, both in relation to the overall legislative scheme of which it is part and relation to the impact it has on the person whose constitutional rights are allegedly contravened. The applicant further argued that section 1(4) empowered the Board to treat two or more business entities as constituting one employer for the purposes of the *Labour Relations Act* only where each of the three following preconditions have been met:

1. There is more than one corporation, individual, firm, syndicate or association involved;
2. The activities or businesses must be under common control or direction; and
3. The related or associated activities or businesses must be carried on by the employers concerned.

It was argued by the applicant that one of the main purposes for which section 1(4) was enacted was in order to protect the choice made by a majority of the employees of an employer to be represented by a bargaining agent. Further, upon employees choosing to be represented in their dealings with their employer through a certified bargaining agent, the certified union was granted bargaining rights which attached to the business activities which gave rise to the employer-employee relationship. The applicant reasoned that it was in order to preserve the union's bargaining rights, and therefore to protect the decision of a majority of the employees to be represented by a trade union, that section 1(4) was enacted.

24. The purpose of section 1(4) of the *Labour Relations Act* is to preserve the bargaining rights of a trade union and therefore to protect the decision of a majority of employees to be represented by a trade union. In the absence of section 1(4), the selection made by employees to be represented by a specific trade union could and would be undermined and destroyed by an employer's decision to create subsequent non-union companies and to perform part or all of its business activities which were previously carried out by the unionized company through a non-union company or through non-union companies either by diverting work or transferring work from the unionized company to non-union companies. Section 1(4) is part of an overall scheme contained in the *Labour Relations Act* which include certification, termination and unfair labour practice provisions for affording to employees the right to bargain collectively

with their employer through a certified trade union of their choice and also for protecting this right from the conduct of an employer which either incidentally or intentionally destroys the collective bargaining rights which employees have acquired pursuant to the *Labour Relations Act*.

25. In our view, the position of employees in a related non-union company to which a certified employer's business has been transferred is no different from that of employees hired by an employer after an employer's work force has chosen to be represented by a trade union as a result of the Board's certification under section 7 of the Act. Section 1(4) does not prevent employees from bringing timely applications to terminate a trade union's bargaining rights or prevent another trade union from making an application to displace an incumbent trade union. The purpose of section 1(4) is to protect existing bargaining rights and the Board has been given a discretion to exercise in the issuance of a declaration under section 1(4) only so as to advance the purpose of preserving bargaining rights which have been obtained in conformity with the *Labour Relations Act*. In our view, the provisions of section 1(4) do not interfere with the right of employees to select a bargaining agent as and when a majority of such employees so desire. When a trade union has been certified as a bargaining agent, its bargaining rights extend to the business carried on by the employer who has been certified. When such an employer, for whatever reason, chooses to operate his business through another vehicle separate from the one which was active at the time of the certification, the desire of the majority of his employees to be represented by a trade union would be frustrated in the absence of a provision of the type represented by section 1(4). Section 1(4) underlines the right of employees to select their own bargaining agent as desired by a majority through the processes of certification under the *Labour Relations Act*. The Board finds that section 1(4) of the Act does not contravene section 2(d) of the *Charter* because it preserves the freedom of association rather than denying it. The objections of counsel for FDV and Bluebird to the constitutionality of section 1(4) is therefore denied by the Board.

26. Having regard to the evidence and representations before it, the Board finds that associated or related activities or businesses are carried on by FDV, Bluebird and GP. The next criterion to be determined under the provisions of section 1(4) is whether they are under common control or direction. In *Walters Lithographing*, [1971] OLRB Rep. July 406, the Board stated the following criteria in determining whether there is common control or direction: (i) common ownership or financial control; (ii) common management; (iii) interrelationship of operations; (iv) representation to the public as a single integrated enterprise and (v) centralized control of labour relations. While counsel for FDV and Bluebird objects to the Board's jurisdiction, he concedes that the necessary preconditions exist with respect to FDV and Bluebird for a declaration under section 1(4). The Board agrees with this assessment. With respect to the first criterion of common ownership or financial control, the Board decided in *Evans-Kennedy Construction Ltd.*, [1979] OLRB Rep. May 388 that in order for there to be common control or direction it was not necessary that there be common ownership. In the case before the Board the ownership of FDV, Bluebird and GP has been deliberately presented and arranged so as to give the appearance of unrelatedness. In all of the circumstances, the Board finds that there is overall financial control of FDV, Bluebird and GP by Mr. Moffat. With respect to the second criterion of common management, the evidence abundantly supports a finding that these three companies all had the same common management, exercised through Mr. Moffat, Mr. Beardesley and Mr. Yanisiew. With respect to the third criterion of interrelationship of operations, it is again quite clear that these three companies were more than capable of taking over and substituting one for the other on any project which any one

of them was doing. With respect to the fourth criterion of representation to the public and as a single, integrated enterprise, the evidence on this supports a finding that there was a representation to the public of being different enterprises, notwithstanding the reality of the situation. With respect to the fifth criterion of centralized control of labour relations, the conduct of Mr. Moffat in seeking to keep one step ahead of the applicant and in marshalling the employment by the companies, indicates that the centralized control of labour relations was exercised by Mr. Moffat through Mr. Yanisiew. In considering all of these criteria the Board finds that FDV, Bluebird and GP are under common control and direction. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 there was similarly an ease of transfer of work and a similar importance of a single principal to more than one integrated enterprise. The Board finds that the criteria set forth in section 1(4) has been satisfied and declares that FDV, Bluebird and GP were and remain bound by the collective agreement from the time that FDV first entered into collective bargaining with the International Brotherhood of Electrical Workers, Local Union 1687 and with respect to Bluebird and GP from the date of their incorporation.

27. Having regard to the evidence before it, the Board is not prepared to find that there was a sale of a business with respect to FDV, Bluebird and GP or any of them within the meaning of section 63 of the *Labour Relations Act*.

28. Having regard to the evidence and representations before it and pursuant to the provisions of the *Labour Relations Act*, the Board makes the following declarations and orders:

- I On or about April of 1982 and continuing thereafter, F.D.V. Construction Limited and 515112 Ontario Limited carrying on business as Bluebird Construction have carried on associated or related activities or businesses under common control or direction and on or about June 1983 and continuing thereafter, F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction have carried on associated or related activities or businesses under common control or direction.
- II F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction are bound by the collective agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the International Brotherhood of Electrical Workers Construction Council of Ontario.
- III F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction shall forthwith apply the terms and conditions of the said collective agreement to such projects covered by the said collective agreement which F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction were, are or will be engaged.

- IV F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction, William Moffat and Graham Pope have violated sections 64 and 66 of the *Labour Relations Act*.
- V F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction, William Moffat and Graham Pope shall forthwith cease and desist from violating sections 64 and 66 of the *Labour Relations Act*.
- VI F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction, 556631 Ontario Limited carrying on business as G. P. Construction, William Moffat and Graham Pope shall forthwith comply with the terms and conditions of the said collective agreement, in accordance with the provisions of the *Labour Relations Act*, and employ and continue to employ members in good standing of the International Brotherhood of Electrical Workers, Local Union 1687 and to hire such employees through the International Brotherhood of Electrical Workers, Local Union 1687 to perform the work covered by the said collective agreement at the projects at which they may now or hereafter be engaged in accordance with the said collective agreement.
- VII F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction, William Moffat and Graham Pope shall forthwith apply the terms and conditions of the said collective agreement to all employees who perform work covered by the said collective agreement at any of the projects that which it may now or hereafter be engaged.
- VIIIF.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction and 556631 Ontario Limited carrying on business as G. P. Construction, William Moffat and Graham Pope shall be jointly and severally liable to pay damages by reason of violations of the said collective agreement, including any charges, interest or penalties with respect to any unpaid amount of wages, benefits, contributions, deductions, allowances and other required payments, pursuant to the said collective agreement.

29. The Board has no authority to award costs as requested by the applicant and the request for its costs in the form of damages is dismissed.

30. The Board directs FDV, Bluebird and GP to each post a copy of the attached notice after being duly signed by the representative of FDV, Bluebird and GP, respectively, in a conspicuous place on their projects where it is likely to come to the attention of the employees

in the bargaining unit. The notices are to remain posted for 60 consecutive working days on the projects or for an aggregate period of 60 days where FDV, Bluebird and GP engaged in projects which do not extend over a period of 60 days, reasonable steps shall be taken by FDV, Bluebird and GP to ensure that the notice is not altered, defaced or covered by any other material. Reasonable physical access to the project shall be given by FDV, Bluebird and GP to a representative of the International Brotherhood of Electrical Workers, Local 1687 so that the International Brotherhood of Electrical Workers Local 1687 can satisfy itself that this posting requirement is being complied with.

31. The Board remains seized of these matters pending the agreement of the parties on the damages and consequent amounts payable to the International Brotherhood of Electrical Workers, Local 1687 and on any issue regarding the implementation of the declarations and orders. The Registrar is directed to list for hearing Board File No. 1503-83-M at the request of any of the parties hereto.

[Notice to Employees omitted: Editor]

2823-85-U Aluminium Brick and Glass Workers International Union AFL-CIO-CLC and its Local 295G, Complainant, v. **Ford Glass Limited**, Respondent

Arbitration - Interference in Trade Unions - Practice and Procedure - Unfair Labour Practice - Union requesting copies of master plan containing information on benefits provided by collective agreement - Employer refusing copies but permitting review of copy in company downtown office - Constituting interference - Not deferring to arbitration

BEFORE: Judge R. S. Abella, Chairman, and Board Members D. Patterson and F. W. Murray.

APPEARANCES: James Hayes, Don Clifford, Max Staces and John MacKenzie for the complainant; Mark Contini, Mary Ellen Cummings, James Tiernay and Michael Kyne for the respondents.

DECISION OF THE BOARD; May 28, 1986

1. This is an application pursuant to section 89 of the *Labour Relations Act* alleging that the Respondent violated section 64 of that Act.

2. The complainant and respondent have had a collective bargaining relationship for over 20 years. In the existing collective agreement, reference is made to various benefits, all of which are contained in a Master Plan located at the respondent's head office in downtown Toronto. The union has repeatedly requested copies of this Master Plan containing the Plans, Policies and Documents dealing with all welfare benefits provided for by the collective agreement. The respondent refused to provide actual copies of the Plan, but told the union verbally and in writing that the union could review the Master Plan at the downtown office anytime it wanted. In addition, a pamphlet outlining in a summary way the benefits provided, was made available to the union. The company, in a letter to the union dated December 4, 1985, told the union that the request was denied based on past practice, on the fact that matters of administration were the responsibility of the Company and on the fact that "The Personnel Department is available in such circumstance to provide information or clarification on any question raised with regard to specific details of benefits or coverage." In short, the Company feels it has given the union all the information it needs.

3. The union claims that this is an awkward, obstructive and inconvenient methodology, that questions are asked by union members at the plant relating to specific benefit provisions, and that to answer them the union is required to phone the respondent's personnel department. The result for the union is that it must wait anywhere from 2 weeks to 3 months to get answers to employee's questions. Max Stacey, president of Local 295 said that he wants to be able to answer members' questions promptly, and that reviewing the Master Plan at the head office is of no assistance in spontaneously dealing with benefit issues that may arise.

4. The union asserts that the refusal by the company to provide them with a copy of the Master Plan violates section 64 of the *Labour Relations Act*. Section 64 states:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or

administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

5. The company asserts that there has never been a refusal by the company to reveal information and that all the union wants is more convenient access to it. It alleges that representational rights are in no way jeopardized, and that to fall within the ambit of section 64, the company activity must have a significant impact on protected union activity. (See *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1983] OLRB Rep. Sept. 1411).

6. In our view, the company's refusal to provide a copy of the Master Plan to the union interferes with the "representation of employees by a trade union" within the meaning of section 64 of the Act. It goes beyond the simple matter of convenience. The union is charged with the responsibility fairly to represent its members and to safeguard their rights under the collective agreement pursuant to its legal obligations under section 68 of the Act. To do this adequately, it requires information and ought not to be put to the burden of travelling to downtown Toronto or calling the Personnel Department every time it needs an answer to a question arising out of the agreement. There is no doubt that the company has provided access to the information, but it is not meaningful access if it is not readily accessible to the union for the benefit of its members and for the proper discharge of its representational duties. The company has offered no countervailing business purpose for withholding a copy of the Master Plan, a copy it is prepared to show but not give to the union, and in balancing competing interest, therefore, the union's representational obligation prevails. The adverse impact on the union's representational rights of withholding physical possession of the information outweighs the company's interest in wishing not to release it.

7. At the conclusion of this case, the company raised the deferral issue. Initially, the union was proceeding to arbitration, relying on the Recognition clause in the Collective Agreement. Both a company and union nominee have been selected, but no chairman has yet been nominated. The company's position is that this is a matter of interpretation of the Collective Agreement, that any disclosure obligation is to be found in the agreement, and that the Board should defer to the arbitral process. The union's position is that rights contained in section 64 are overriding statutory rights and that the Board's jurisdiction ought not to be ousted in this case. It claims that the Board is the most appropriate tribunal to deal with an issue such as this, that it is not clear that under the Recognition Clause or the provisions of Appendix B dealing with "Welfare Benefits" that the relief claimed is available, and that in any event the Board ought to exercise its discretion in favour of retaining jurisdiction to enunciate rights under the Act.

8. It is not every case in which the Board will defer to arbitration and the principles to be applied in balancing the competing interests have been elsewhere articulated (See *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254; *Sunworthy Wallcoverings*, [1986] OLRB Rep. Jan. 164.) In this case, we are dealing with substantially more than the interpretative analysis of a collective agreement. What is alleged is a breach of the legislative centrepiece of the collective bargaining process in this province. The clarification of the parties' respective duties and entitlements under the Act is one of the legitimate functions of proceedings under section 89 of the Act. Where, as here, a novel issue arises as to the duty of informational disclosure during the subsistence of a collective agreement and whether section 64 requires such disclosure, it is appropriate for the Board to decline to defer to arbitration.

9. For the foregoing reasons, we are satisfied that section 64 obliges the company to provide the union with a copy of the Master Plan. The sole remedy sought by the complainant is a direction from the Board that the company provide this document to the union. In the circumstances, the Board finds that to be an appropriate remedy and so directs.

2030-85-R Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., Applicant, v. **Green Gables Manor Incorporated**, Respondent

Certification - Employee - Practice and Procedure - Employer claiming all of its RNA's exercising management functions - Board drawing employer attention to relevant jurisprudence and requiring filing of written submissions as to basis of employer's position - Employer submissions not going beyond bold assertion that persons managerial - Board not making further inquiry into duties and responsibilities - Whether employer allowed to amend employee list after interim certificate issued upon waiver of hearings

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *W. F. Rutherford* and *I. Stamp*.

DECISION OF THE BOARD; May 15, 1986

I

1. This is an application for certification which was filed on November 12, 1985. It was scheduled for hearing before the Board on November 29, 1985. On that date, the parties met with a Labour Relations Officer prior to the hearing, in an effort to simplify or resolve the matters in dispute between them. The respondent was represented by Mr. R. Haluszka, the respondent's administrator, and Ms. M. J. Krizanc, an industrial relations "consultant". The applicant union was represented by Allen Ferens and Linda Ames-Elliott.

2. The representatives of the parties eventually reached complete agreement on the description of the unit of employees appropriate for collective bargaining. The parties then turned to the lists of employees filed by the respondent in accordance with its obligation (outlined in Form 4) to furnish a list of employees which it certifies to be accurate. The employee lists were amended and settled.

3. The Officer then turned to the union's documentary evidence of membership, noting its form and any defects or irregularities appearing on the face of same. There were none. The Officer also advised of the details of the Form 9 Statutory Declaration filed by the union, attesting to the regularity and sufficiency of the membership evidence. The respondent was given the opportunity to examine that document. The respondent was *not* given the opportunity

to examine the union's documentary evidence of membership because section 111(1) of the Act reads as follows:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

The Legislature has recognized that an employee's decision to join a union is not a neutral event from the employer's point of view. Too often, the precise identification of union supporters has merely facilitated threats of discharge or other forms of employer reprisal.

4. The Officer then turned to the "membership count": the degree of union support based upon the number of employees on the amended lists and the number of membership cards filed by the applicant union. This raised a minor complication because the employer was asserting that 9 of the 38 individuals *potentially* in the bargaining unit exercised "managerial functions" within the meaning of section 1(3)(b) of the Act and, therefore, were not "employees" covered by the Act. Section 1(3)(b) reads as follows:

(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

[emphasis added]

It was the respondent's submission that these nine individuals were all part of the "management team", and were not entitled to join a trade union or engage in collective bargaining.

5. As it turned out, the resolution of this dispute could not affect the union's right to certification on an interim basis pursuant to section 6(2) of the Act. It was apparent that whether or not the disputed individuals were included in the bargaining unit, the union enjoyed the support of well over fifty-five per cent of the employees. Indeed, the degree of union support ranges from eighty-nine to ninety-seven per cent, depending upon the precise composition of the bargaining unit. In the circumstances, the Officer advised the parties that, subject to the Board's normal second check of the union's membership evidence, an *interim* certificate would issue. The parties were asked if it was necessary to appear before the panel to make any further representations with respect to this application and, upon giving a negative response, they signed a "waiver of hearing form" which is framed as follows:

The parties have appeared before an Officer of the Board and subject to the Board's normal practice of second check, hereby consents to the Board issuing a decision in this matter based upon the submission made and agreements reached without a hearing before a panel of the Board.

6. In its decision released January 28, 1986, the Board corrected the name of the respondent, found the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, and accepted the parties' agreement with respect to the bargaining unit description. The Board noted the extent of the parties' disagreement with respect to the composition of that bargaining unit, and then went on to say:

5. It is apparent that regardless of the disposition of this dispute concerning the composition of the bargaining unit, the union will be entitled to certification. On the basis of the documentary evidence of membership filed in support of this application, the Board finds that, whether or not the disputed individuals are included in the bargaining unit, more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 21, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Accordingly, the Board hereby certifies the applicant on an interim basis for the bargaining unit described above. A final certificate will await a resolution of the status of the disputed individuals. We wish, however, to make some concluding observations.

6. Obviously there is a dispute between the parties which may ultimately have to be resolved after hearing evidence about what the disputed individuals actually do; moreover, this is not the first time that there has been some question as to where to draw the "managerial line" in hospitals or nursing homes. However, the number of disputed individuals is quite unusual, given the size of the respondent's employee complement and the exclusion of registered nurses, paramedical employees, professional medical staff and however many persons there are whose managerial status is not disputed. While there is no fixed ratio of superiors to subordinates, and each case must be determined on its own merits, it is a little unusual for an employer to argue that there is a "management person" for every three or four subordinates in the bargaining unit or that some of the employer's management team only work part-time.

7. The Board's approach to the "managerial exclusion" has been succinctly summarized in *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121. In that case the Board affirmed that the important question is the extent to which so-called managerial employees regularly make significant decisions affecting the economic lives of their fellow employees (hiring, firing, promotions, demotions, discipline, granting wage increases, etc.), thereby raising a potential conflict of interest with them. But this is not the same as "supervisory" or "co-ordinating" activities which are often largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or have specialized technical or professional training will commonly supervise or co-ordinate the work of other employees without triggering their exclusion from the *Labour Relations Act*. If that were the case, registered nurses would be denied the opportunity of collective bargaining since their professional responsibilities will often involve the coordination of the work of employees with lesser training. [In this regard, see: *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84, where the Board rejected an employer's contention that its entire complement of full-time and part-time registered nurses exercised managerial functions within the meaning of section 1(3)(b) of the Act; and *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199, where a similar request to exclude registered nurses was also rejected. See also, in general, J. Sack and M. Mitchell, *Ontario Labour Relations Board Law and Practice* (1985), Butterworths & Co. (Canada) Ltd., Toronto at pages 79-98.]

8. Certification applications usually come on for hearing and are disposed of quickly with little in the way of formal pleadings. However, as a result, disputes about the bargaining unit may only arise on the morning of the hearing when the union first sees the employer's proposed list of employees, and the parties may not have had the opportunity to fully investigate the facts or the Board decisions potentially bearing on their positions. They may even have quite different perceptions of the disputed individuals' authority (or how the Board would regard it) which could be clarified by further consideration. If that appears to be the case (as it is

here), it may well be appropriate for the Board to borrow from the Court practice of pleading and discovery in order that both sides and the Board itself will have a clear picture of the factual issues in dispute.

9. In the circumstances of this case, before appointing a Labour Relations Officer and embarking upon a time-consuming and expensive process of litigation, the Board considers it appropriate to require further clarification and elaboration of those duties and job functions which, in the employer's submission, would warrant a finding that the disputed individuals are not "employees" within the meaning of the *Labour Relations Act*. Such written statement should include a detailed recital of the duties regularly performed by the disputed individuals, highlighting those which involve the conflict of interest which section 1(3)(b) was designed to avoid, and citing concrete instances of the exercise of those functions. It should be forwarded to the Board and to the union within fourteen days of the receipt of this decision. The trade union representative will then have a further fourteen days to file with the Board a written submission, indicating the extent of its agreement or disagreement with the facts said by the employer to truly represent the employees' duties and such additional facts as the union may consider relevant.

10. For the foregoing reasons and pursuant to section 102(13) of the Act, the Board directs the parties to file with each other and the Board the information mentioned above. It may be that in examining their position the parties will be able to resolve or narrow some of the issues in dispute between them. In any event, it is the Board's view that the filing of this material will facilitate the orderly disposition of whatever outstanding matters remain in dispute.

7. By letter dated February 4, 1986, Mr. R. Haluszka, the respondent's administrator, addressed the following comments to the Board:

Further to your correspondence, file no. 2030-85-R, dated January 31, 1986, on behalf of the owners of Green Gables Manor I wish to point out several factors which were not considered either at the certification hearing or subsequently. We feel these are urgent items, yet since the events of late November we have received no communication on this subject from anyone, leaving us in the uncomfortable state of "LIMBO" while having to cope with much misinformation and poor employee morale. Our employees have not been kept informed by their representatives, whomever they are, and as a result have been alienated by these events. Many employees have indicated in private conversations with myself or the owners that they were coerced through peer pressure into signing the Union cards and wish that they had never signed.

In this regard, I would first like to point out that in the opinion of the Owners, the issue of numbers and staff per centages [sic] has neither been addressed nor resolved. At the certification hearing a listing comprising 36 employees was presented by Mrs. Muriel Krizanc of Krizanc Consulting Ltd., which purported to indicate the employees of record at Nov. 21, 1985. This listing and copies of employee signatures was reviewed in-camera by the Union organizers and a Labour Board representative, who determined that 26 names and signatures matched. Not personally being permitted to examine any documentation, I cannot accept that as fact, after all you do not and would not accept my "word" without examination.

I am attaching a listing which I compiled prior to the hearing and presented to Mrs. Krizanc, who did not use it contrary to the best interests of the Owners. This listing was compiled from our personnel and payroll records, and indicates that in all probability the required fifty-five per cent was not obtained by the Union. Our payroll records are available for your scrutiny to verify names and numbers. I feel, in view of this question of numbers, at the very least a recorded vote is called for.

Additionally, I must note that the current staff list has a few additional changes, including employees who were never consulted with regard to the issue of belonging to a Union, whose individual Human Rights would be violated by the imposition of a Union. I would suggest that substantially fewer than forty-five [sic] percent of our current staff have signed Union cards.

With regard to the decision of the Board, item 4 on page 1, we note that Registered, graduate and undergraduate nurses are excluded from the proposed unit. Our Registered Nursing Assistants perform essentially the same duties as our RN's, with the exception of tasks associated with the dispensing of medications. We do not agree with the applicant Union that our RNA's do not perform "managerial functions" and further do not agree with the Board, as it stated in item 5 on page 2 that whether or not these individuals are included, "more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 21, 1985."

In view of these facts, and the current climate, where as you doubtlessly know, one Union is under fire in the media and the courts for the conduct of its officers, I request that you give serious immediate reconsideration to the issue of certification at Green Gables Manor. We regard item 9, pages 3 and 4 an insult, as you indicate that you do not wish to waste time or expense in a process you have weighted against all employers. Yet, the consequences of your decisions have forced employers to waste much time and money, and occasionally have forced bankruptcy. A truly impartial agency would recognize facts and would view its work seriously. However, we shall be forwarding the additional information you requested with the allotted [sic] time, which is fourteen days from today, or February 18, 1986.

8. By this time the consulting services of Ms. Krizanc had apparently been terminated. Subsequently, on February 18, 1986, the respondent sent to the Board certain undated, unsigned job descriptions together with a covering letter which reads as follows:

Attached please find copies of job descriptions of Registered Nurses, Registered Nursing Assistants and Nurse Aides at Green Gables. You will note that with the exception of the duties related to the dispensing of medications, which are statutory, there is no difference between our charge nurses as to their position of floor supervisors.

We are a small home, and rely on our professional staff to supervise their staff and ensure that the Nursing Care provided is of the highest standard, regardless of whether they are an RN or RNA.

As SEIU has stated that they are not representing supervisory personnel, in my opinion, our RNA's should be excluded from the bargaining unit.

9. There was no reference to the duties and responsibilities of the activity director or the supervisor of dietary staff. The respondent's submission was confined to the purported duties of the registered nurses ("RN's") and the five full-time and two part-time registered nursing assistants ("RNA's"). Moreover, while the decision of the Board quite clearly required a detailed recital of the duties of a *managerial character* which the respondent asserts are regularly performed by the disputed individuals, together with concrete instances of the actual *exercise* of those functions, no such facts or information were put before the Board. In summary then, the respondent's position amounts to an assertion, without foundation, that a large number of individuals (given the size of the bargaining unit) are not "employees" within the meaning of the Act, and in the face of a specific direction to elaborate the basis for its position, the respondent has neglected to do so. It merely asserts that because RN's and RNA's have certain professional training and responsibilities to ensure the adequate delivery of health care they should be regarded as "managerial" personnel prohibited from engaging in collective bargaining.

10. For its part, the union made a variety of submissions based upon its own discussions with the disputed employees (essentially that they do not exercise disciplinary or other powers of a "managerial" character in the sense contemplated by section 1(3)(b) of the Act) and

concluded: "For all the reasons outlined above and because the respondent has failed to supply the Board with evidence it requested, we ask that the Board find all the employees in dispute are in fact "employees" within the meaning of the *Labour Relations Act* and do not exercise managerial responsibilities". The reference to "evidence" is perhaps inaccurate, but there is no doubt that the Board did direct that the respondent fully set out all of the facts supporting its assertion that the disputed individuals exercise managerial functions.

II

11. Before returning to the particular circumstances of this case and the various matters raised in the respondent's letters, it may be useful to sketch in some of the jurisprudential background which prompted the Board's direction to the respondent to fully particularize its position. While collective bargaining and trade union organization may be a novelty for the respondent, it is not new to the Board or the health care industry. General unions such as the applicant or the Canadian Union of Public Employees commonly represent bargaining units including RNA's (and sometimes RN's) at dozens of hospitals and nursing homes in Ontario. Likewise, the Ontario Nurses' Association typically represents bargaining units of registered nurses at those same institutions. RN's and RNA's have never been regarded by the Board as "managerial" simply because their higher level of training carries with it a professional responsibility to monitor or supervise the activities of employees further down the job hierarchy. That is why the Board directed the respondent's attention to its decisions in *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84 (Application for Judicial Review Dismissed, *sub nomine Medi-Park Lodges Inc. c.o.b. Oakwood Park Lodge v. Ontario Nurses' Association et al*, 83 CLLC, ¶14,016), and in *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199. The purpose of drawing these cases to the respondent's attention was to assist a party (unrepresented by counsel) to frame its submissions and focus on factors which were relevant.

12. Both of these cases begin with the proposition that it is incumbent on persons who seek to exclude employees from the scheme of the Act to demonstrate that such persons actually *exercise* managerial functions (see: *Bakery and Confectionery Workers I.U.A. v. Salmi*, 56 D.L.R. (2d) 193). They then undertake a thorough review of the special characteristics of the health care sector and the Board's evolving jurisprudence as to what constitutes "management" (for collective bargaining purposes) in that employment context. It is unnecessary to reproduce that analysis here. It suffices to say that this panel of the Board adopts the approach to the interpretation of section 1(3)(b) enunciated in *Oakwood Park Lodge* at paragraphs 5 to 17 and, more recently, in *Ottawa General Hospital* at paragraphs 5 to 16, which distinguishes between "professional" and "managerial" responsibilities. *Oakwood Park Lodge* and *Ottawa General Hospital* both involved an employer's assertion that certain registered nurses should be excluded from the bargaining unit. After analyzing the special work environment and collective bargaining features of the health care sector, and a number of earlier decisions, the Board in *Ottawa General Hospital* observed:

16. All of these cases involved individuals who, in varying degrees were performing supervisory, co-ordinating, admonitory or "quality control" functions which historically or in other contexts might have been associated with managerial status. Such functions included: co-ordinating the work of others, ensuring that the work was done properly in a technical sense, checking and correcting it where necessary, reporting or making note of errors or deviations from the prescribed medical regimen, scheduling, arranging for a "fill in" if a member of the

team is absent, allowing an orderly or aide to go home a few hours early, giving an opinion on the proficiency, work habits, competence or compatibility of new or lesser skilled employees when asked to do so by a member of management, delegating or rearranging work assignments, calling in plumbers or maintenance persons to handle mechanical break-downs on "off-shifts", attempting to ensure compliance with the institutional "rules" laid down by management and admonishing or reporting an employee who did not comply, consulting with management on the running of the enterprise, and, even, on occasion, requiring an employee unfit to work to go home for the balance of the shift then reporting the incident to the director of nursing for disposition. Each case, of course, turns on its own facts, but their general thrust is the same: supervisory, co-ordinating, training, testing, reporting, consulting and *minor* admonitory functions were not, in the opinion of the Board, (and in the context of this industry) considered to be "managerial functions". They did not signify the kind of effective control or authority over the employee and his employment relationship which justified exclusion pursuant to section 1(3)(b). And in a professional context where "reporting" is part of an individual's professional responsibilities and the ultimate decisions are made by someone else (usually an "administrator" who may or may not be a professional himself) or by a group of individuals, then the "effective recommendation test" referred to above must be carefully applied.

13. In each of these cases the Board recognized that as collective bargaining has extended to technical and professional employees in the health care sector, it has had to refine its notion of what constitutes "management" in order that the "opinion" which it must express under section 1(3)(b) of the Act will accord with the premises of the statute and collective bargaining realities. An attack on this process, launched by the nursing home operator in *Oakwood Park Lodge, supra*, was rejected by the Supreme Court of Ontario with the following comment:

In our view, the reference to unionization in other facilities of the applicant, as well as the consideration of developing themes in relation to the role of professionals in collective bargaining are matters within the expertise of the Board which it can consider in evaluating the case before it. The fact that the Board considered decisions made in earlier and other cases involving similar applications does not, in our view, constitute an examination of extraneous matters, but rather a consideration of matters which the Board is perfectly entitled to consider when bringing its specialized knowledge and expertise in labour relations to bear on the application for certification.

III

14. It is against this background that the Board made the direction found in paragraph 9 of its original decision. There have been dozens and dozens of cases in which RNA's have been routinely included in service bargaining units of the kind which the applicant seeks here. Similarly, there have been dozens of cases in which RN's have formed their own separate bargaining unit. There have been a number of cases where the Board has grappled with the question of whether a *particular* registered nurse (usually a "charge nurse" or a "head nurse" or "team leader", etc.) has exercised managerial functions so as to put her outside the definition of "employee" and the bargaining unit. The Board is not aware of *any* case in which an RNA has been excluded from the bargaining unit on the basis of "supervisory" responsibilities vis-a-vis health care aides, porters, orderlies, etc., and certainly there is no case in which an employer's *entire complement* of full-time and part-time RNA's have been considered to be "managers" for collective bargaining purposes. Of course, this is not to say that an employer such as the respondent is precluded from asserting such a novel or unusual proposition. It is possible that the respondent's administrative structure and the responsibilities of its RNA's are substantially different and distinguishable from those exercised by RNA's in

other nursing homes or hospitals in Ontario, and that all seven RNA's (full-time and part-time) have hired, fired, promoted, demoted, disciplined employees (etc.) or otherwise *exercised* functions of a managerial character within the meaning of section 1(3)(b). It is *possible* that there could be a "manager" for every three or four "employees". But it is not probable, and in the circumstances of this case, the Board considered it appropriate to direct the filing of a full and detailed written submission before embarking upon a time-consuming and expensive process of litigation which would inevitably delay the issuance of a final certificate and significantly prejudice the rights of employees whose status is not in dispute.

15. What was the employer's response? In the case of the "activity director" and the "supervisor, dietary staff" there was none at all. In the case of the RNA's, there was simply an undated and unsigned job description for RN's and for RNA's which, curiously, purports to give more "managerial authority" (in its collective bargaining sense) to RNA's than to RN's. The Board directed the filing of a "written statement which should include a detailed recital of the duties regularly performed by the disputed individuals, highlighting those which involve a conflict of interest which section 1(3)(b) was designed to avoid, and citing concrete instances of the exercise of those functions". There was none. Indeed, save for one item on the RNA's job description, none of the duties therein listed (assuming they were exercised) would prompt the RNA's exclusion from the bargaining unit. The only exception is a portion of item 18 describing "effectively recommends disciplinary activities which could culminate in dismissal" - a function which does not appear in the job description of the registered nurses who are clearly the RNA's professional superiors. In short, there is no factual assertion or concrete instance of the *exercise* of any function which would warrant a conclusion or even a formal inquiry into whether all of the full-time and part-time RNA's exercise managerial functions within the meaning of section 1(3)(b) of the Act.

16. We are left with a bald assertion, without foundation, that all of these persons are "managerial" together with a written submission which is totally inadequate and fails to comply with the Board's direction to the respondent to fully particularize its position in the manner set out in paragraph 9 of the earlier Board decision. Having directed the employer to clarify and particularize its position, having pointed the employer to the relevant Board jurisprudence and having received a submission which is not responsive to the Board's direction, the Board is not persuaded that it should inquire further into the duties and responsibilities of the individuals whom the respondent says are not "employees" within the meaning of the Act. Should their status be in question at some future time (and we repeat there is nothing in the material before us to indicate any basis why it should be), the parties can address that question at the bargaining table or under section 106(2) of the Act.

IV

17. Is there any basis to reopen and reconsider the Board's initial decision, or to allow the employer, at this late date, to amend the employee lists, or to direct the taking of a representation vote? In our view, the answer is no.

18. In support of this application for certification the union filed documentary evidence of membership on behalf of some ninety or more per cent of the employees in the bargaining unit. This documentary evidence took the form of membership cards which include a

combination application for membership and an attached receipt. The card is signed by the individual employee concerned, and is also signed by the individual soliciting his support ("the collector") to verify that the proper signature and one dollar payment have been secured. All of the cards indicate that a payment of one dollar has been made. The documentary evidence is supported by a properly completed Form 9, Statutory Declaration, concerning the regularity of the membership material. The membership evidence was all filed by the "terminal date" fixed pursuant to section 103 of the Act. There was no allegation of impropriety in the solicitation of the union's membership evidence.

19. Notice to employees of the certification application in Form 6 was posted on the employer's premises in conspicuous places where it would come to the attention of the employees potentially affected by this application. The Notice specifically advises employees of their right to object and the general manner in which such objection should be filed. No objection was filed, nor has any *employee* complained about the manner in which the union has conducted its organizing campaign. Whether or not "peer pressure" would be a factor for the Board to consider in assessing the weight to be accorded to the employees' written support for the union, and whether or not it is significant that these purported employee concerns surfaced only much later in "private conversations" with the employer's owners, the fact is that no *employee* has ever indicated any opposition to the trade union, nor resiled from the support indicated by signing a membership card - whatever they might have said in conversations with their employer. No such *employee* representation was made either on the day of the hearing or at any time thereafter.

20. There is no basis whatsoever, at this late date, to reconsider and reopen the hearing to permit the employer to reconstruct the employee list, long after the union membership has been revealed and, indeed, after the union has been certified on an interim basis - particularly since it was the employer's obligation to submit a list certified to be accurate prior to the hearing date. Contrary to Mr. Huluszka's submission, the list was fully and finally resolved on November 29, 1985, and a formal waiver of hearing was executed on the respondent's behalf. It is too late now to say that the list submitted by the employer is inaccurate and should be revised. Whether the consultant representing the respondent properly used information provided to her is a matter between the respondent and that consultant (but it is not obvious to us why persons purportedly terminated prior to the application date should somehow continue to be treated as the respondent's employees). In any case, questions concerning the employee list and the union's membership evidence were finally determined on November 29, 1985, and we do not think that it is appropriate to reopen the matter now any more than it would be appropriate if the application had been dismissed for the union to challenge the employee list or submit more membership cards.

21. Having regard to the foregoing, a final certificate can now issue to the applicant in respect of the bargaining unit more particularly described in paragraph 4 of the Board's decision of January 28, 1986. For the purpose of clarity, and for the reasons set out above, the Board is not prepared to exclude from that bargaining unit either RNA's or the "activity director" or the "supervisor - dietary staff".

0507-85-R; 0508-85-R; 0509-85-R; 0510-85-R; 0841-85-R; 0877-85-R International Union of Operating Engineers, Local 793, Applicant, v. **Harnden & King Construction Ltd.**, Respondent, v. Group of Employees, Objectors

Certification - Practice and Procedure - Officer's memorandum noting parties' agreement on exclusion of person - Respondent's written submissions acknowledging accuracy of officer memo - Whether allowed to challenge accuracy six months later at Board hearing

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *S. B. D. Wahl* and *J. Slaughter* for the applicant; *Bruce Binning* and *Grant Robinson* for the respondent; *Peter M. Whalen* for the objectors.

DECISION OF THE BOARD; May 15, 1986

1. The hearing in this matter reconvened before the Board on May 1, 1986. At the commencement of the hearing, the Board gave the parties copies of the memorandum the Board had received from the Labour Relations Officer that met with the parties pursuant to paragraph 28 of the Board's decision of April 22, 1986. The parties agreed that the Officer's memorandum correctly described the review of the files conducted by the Officer with the parties pursuant to that decision.

2. Counsel for the respondent then requested reconsideration of the Board's oral ruling made at its hearing on April 14, 1986, that was set out in its decision of April 22, 1986 in respect of Board File No. 0877-85-R. The Board, after hearing the submissions of counsel for the respondent and counsel for a group of objecting employees, delivered the following oral ruling. It was not necessary for the Board to hear from counsel for the applicant.

Counsel for the respondent requests reconsideration of the Board's oral ruling set out in its written decision of April 22, 1986 with respect to Board File No. 0877-85-R on the grounds that the employees affected were all on lay-off at the time the application was processed and notices to employees were posted. Counsel for a group of objecting employees also concurs in the request for reconsideration.

The application for reconsideration is hereby dismissed. That fact was before the Board and was considered by us in our first decision. The Board's oral ruling determined that the notice to employees were given in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. That being the case, it is not open to the respondent and to counsel for a group of objecting employees who have had adequate notice throughout to complain about other employees not having had proper notice of this matter.

3. Following that ruling, the Board proceeded to deal with the parties submissions with respect to the Labour Relations Officer reports, commencing with the report in Board File No. 0507-85-R. Counsel for the respondent sought to argue that the Labour Relations Officer report

mistakenly stated that the parties had agreed to the exclusion of a particular person from the bargaining unit in Board File No. 0507-85-R. After hearing the submissions of all counsel, the Board recessed and then returned to deliver the following oral ruling:

The hearing in this matter convened to deal initially with the representations of the parties with respect to the Labour Relations Officer report in Board File No. 0507-85-R.

Counsel for the respondent, by letter dated April 18, 1986 wrote:

"Dear Sirs,

Re: International Union of Operating Engineers, Local 793, and Harnden & King Construction (Ontario) Ltd. and a Group of Employees
BOARD FILE NO: 0507-85-R

We are Counsel to the Respondent Employer in the above-noted matter. In his Report dated November 6, 1985, the Labour Relations Officer notes that Clayton Elliott should be struck from the list (page 2, para. 6). We have no record or recollection of such an agreement, and consequently disagree with the Examiner's Report in that one respect.

Yours very truly,

Mathews, Dinsdale & Clark

Per:

Bruce W. Binning

BWB:ea

c.c. Mr. G. Robinson
Mr. P. Whalen
Mr. S. Wahl"

The Officer's report was issued on November 6, 1985. The Notice of Report of Labour Relations Officer (Form 68) permits representations to be made and provides in the second section of paragraph 2:

"If you desire to make representations as to the accuracy of the report, your statement of desire must contain a concise statement of your allegations as to errors in or omissions from the report."

[emphasis added]

The Notice of Report of Labour Relations Officer in Form 68 also required that those representations be filed in writing with the Board by November 15, 1985.

Paragraph 6 on page 2 of the Labour Relations Officer report provides:

“The parties agreed that #5 on Schedule “A” *Clayton Elliott* should be struck from the list as he does not fall within the scope of the agreed bargaining unit.”

Counsel for the respondent, by letter dated November 13, 1985 wrote:

“Dear Sirs,

Re: International Union of Operating Engineers, Local 793, and Harnden & King Construction Ltd., and a Group of Employees
BOARD FILE NO: 0507-85-R

We are the Solicitors for the Respondent Employer in the above-noted matter and are in receipt of a Labour Relations Office's [sic] Report dated November 6, 1985. We confirm the accuracy of the Report and make the following cursory representations on the evidence of the witnesses contained therein.

• • •

Yours very truly,

Mathews, Dinsdale & Clark

Per:

Bruce W. Binning

BWB:ea

c.c. Mr. G. Robinson
Mr. P. Whalen
Mr. S. Wahl”

Counsel for a group of objecting employees by letter dated November 15, 1985 wrote:

“Dear Sirs:

Re: Harnden & King Construction (Ontario) Ltd. and International Union of Operating Engineers, Local 793 - Group of Employees - O.L.R.B. File No. 0507-85-R

We are in receipt of Board Officer Larry Stickland's report with respect to the above-noted matter dated November 6, 1985.

We confirm its accuracy and further, wish to make submissions at a hearing of the Board....

Yours very truly,

Beard, Winter, Gordon

Per:

P. Whalen

c.c. Mr. Louis Doucette
Mr. Bruce Binning
Mr. Barry McCracken
Mr. Stephen Wahl''

Counsel for the respondent and counsel for the group of employees submitted at the hearing in this matter that the Officer erred in making the statement in paragraph 6 on page 2 of the report. Counsel for the respondent argued that that error only came to the respondent's and his attention recently, and on becoming aware of it, promptly filed his letter of April 18, 1986. Counsel submits that no such agreement was ever made, and further, that the applicant never challenged the inclusion of Mr. Elliott in the bargaining unit.

Counsel for the applicant submits that no error was made in the Labour Relations Officer's report. He argues that an agreement had been reached prior to the Officer's report issuing. In any event, counsel submits that it is simply too late to permit the respondent to raise the alleged error at this time.

One of the purposes of the written representations filed in response to a Form 68 Notice of Report of Labour Relations Officer is to define the issues in dispute between the parties. Those disputes can relate to the accuracy of the Labour Relations Officer report and to the conclusions the Board should reach in view of the report.

We assume, for purposes of this ruling, that the Officer erred when he wrote paragraph 6 on page 2 of the report because we did not hear any evidence on that factual dispute. Nevertheless, we are satisfied that there must be some certainty to the Board's process. It is inappropriate to permit a party, who in a timely fashion states that a Labour Relations Officer report is accurate, to take a contrary position six months after the date for filing representations and less than two weeks prior to the hearing scheduled to deal with the report.

In our opinion, the parties, although free to make submissions to the Board consistent with their written representations filed in response to Form 68, are not entitled to make submissions to the Board that are opposite to their written representations.

Therefore, the Board now finds that Clayton Elliott is struck from the list as he does not fall within the scope of the agreed to bargaining unit.

Counsel for the employees, after the Board made its oral ruling, asked the Board to note that he submitted during argument that he was not

present when the agreement referred to in the Board's ruling was reached, if there was such an agreement reached. He did not submit that the Labour Relations Officer erred in his report.

5. Following the disposition of that issue, the parties agreed to submit written argument with respect to the Labour Relations Officer reports in Board File Nos. 0507-85-R, 0508-85-R, 0509-85-R, 0510-85-R, 0841-85-R and 0877-85-R.

6. The parties agreed that they would deliver three copies of the written argument to the Board and one copy to the other counsel by 3:00 p.m. on the following dates: Counsel for the applicant is to deliver written argument by May 9, 1986; counsel for the respondent and counsel for a group of objecting employees are to deliver written argument by May 20, 1986, and counsel for the applicant is to deliver reply written argument by May 26, 1986. Counsel for the respondent and counsel for a group of objecting employees advised the Board that they did not desire to reply to each others argument. The parties also agreed that no further oral argument will take place with respect to the Labour Relations Officer reports.

7. The parties further agreed that the hearing commencing on May 27, 1986, will relate to the voluntariness of the statements of desire filed in opposition to the applicant.

8. The parties also agreed that the Board would make its determination with respect to the issue of whether certain persons should be excluded from the bargaining units in these matters because they exercise managerial functions on the basis of only the Labour Relations Officer reports and the parties' written arguments. Evidence that the Board receives in relation to the voluntariness of the statements of desire in opposition to the applicant that might also be relevant to the issue of managerial exclusion will not be considered by the Board in making its determination as to whether certain persons in dispute exercise managerial functions.

9. The parties also agreed that the information in the Labour Relations Officers reports that is relevant to both the managerial exclusion issue and the issue of voluntariness of the statements of desire may be applied by the Board in determining the issue of voluntariness. However, any information that might be relevant to employees perception and therefore relevant *only* to the issue of voluntariness of the statement of desire contained in the Officer reports will not be relied on by the Board in determining the issue of voluntariness of the statement of desire in opposition to the applicant.

10. This matter will continue for hearing before this panel of the Board on May 27, 1985.

0757-84-M International Association of Heat and Frost Insulators & Asbestos Workers and the International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, Applicant, v. **Inscan Contractors (Ontario) Inc.**, Respondent

Construction Industry - Construction Industry Grievance - Damages - Whether work repair or maintenance - Whether construction - Maintenance agreement cannot apply to ICI work because of s.146(2) - Whether union estopped from claiming damages because of past practice of applying maintenance agreement - Whether damages denied because of delay

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *S.B.D. Wahl* and *J. de Wit* for the applicant; *R. A. Werry* and *R. Kurki* for the respondent.

DECISION OF THE BOARD; May 16, 1986

1. The applicants International Association of Heat and Frost Insulators and Asbestos Workers ("the International") and International Heat and Frost Insulators and Asbestos Workers, Local 95 ("Local 95") have referred a grievance in the construction industry to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*. For ease of reference, the Board will refer throughout this decision to Local 95 as though it was the sole applicant except where the text requires reference to both applicants or the International.
2. The general nature of the grievance is that the respondent Inscan Contractors (Ontario) Inc. ("Inscan") is bound together with Local 95 to two collective agreements between the Master Insulators' Association of Ontario Inc. and the International and Local 95. The parties refer to one as the construction agreement and the other as the maintenance agreement. It is alleged that Inscan applied the wrong agreement to certain work on which it employed Local 95 members. The work in question involved the repair of damage resulting from an explosion and fire at the Clarkson Refinery of Gulf Canada Limited ("Gulf"). Inscan applied the terms and conditions of the maintenance agreement. Local 95 contends that the terms and conditions of the construction agreement should have been applied. It seeks to have Inscan pay the Local 95 members employed by Inscan on the project the difference between what was paid to them under the maintenance agreement and what Local 95 claims should have been paid under the construction agreement.
3. The grievance raises several major issues and they are:
 - (1) Is the work performed by Inscan at the Clarkson Refinery work in the construction industry within the meaning of section 1(1)(f) of the Act?
 - (2) Which of the two agreements applies to the work in question?
 - (3) Insofar as the maintenance agreement may purport to apply to construction work in the industrial, commercial and institutional sector of the construction industry, is it void under section 146(2) of the Act?

(4) If Inscan has violated the construction agreement, is Local 95 estopped from claiming damages because of a past practice in the industry of doing fire restoration work under the terms of the maintenance agreement?

(5) If Inscan has violated the Act, should Local 95 be denied relief in the form of damages because of undue delay in filing the grievance?

4. The work performed by Inscan arose out of fire damage to the hydrotreater unit at the Clarkson Refinery. It is one of 11 producing units which make up the refinery. The hydrotreater represents 2 per cent of the physical area of the total refinery. Approximately 15 per cent of the unit was damaged by the fire. The area of the hydrotreater unit affected by the fire was, at most, 12,000 square feet. The end product of the hydrotreater unit is the base stock from which lubricating oils are made. There are two stages to the unit's operation, each of which can operate independently of the other. The day before the fire, both were operational. The day after the fire, neither was operational. Within three weeks the second stage was producing its normal product using feedstock from storage. It operated for approximately five weeks when it was shut-down for a previously scheduled overhaul. That shut-down was for approximately five weeks. At the end of the overhaul shut-down the first stage was operational and by then both stages were restored to full operating capacity.

5. Gulf established a special group to restore the fire damaged area. Richard Ives was construction superintendent of the group and testified at the Board's hearings. Gulf awarded a contract to Adam Clark Company Limited for all electrical and mechanical work. The contract included the repair or removal and replacement of fire-damaged insulation on 6,000 to 7,000 feet of piping, storage vessels, three cooking and reactor towers and other equipment. The piping which required insulating was about 40 per cent of the unit's total piping. Adam Clark sublet the removal of damaged insulation to KLT Insulation Incorporated ("KLT") and the installation of the replacement insulation to Inscan. The value of Inscan's contract was approximately \$378,000.00. KLT was on the job for less than 11 days. Inscan came on the job on April 2nd, 1984, the fourth day after the fire and was on it for nine weeks. Al Taggart, at the time business manager of Local 95, also was aware that Inscan was applying maintenance terms and conditions to the work. He spoke on the telephone with Danny Millington, President of Inscan, on April 6th about the job. He asked Millington if there was not some way Inscan could pay construction terms and conditions because they were both embarking on troubled waters.

6. Inscan finished its work on June 8th. All of the insulators employed by Inscan were requested from Local 95 and referred by it to the project. Inscan had told Local 95 that it required the men to work on the repair of fire damage at the Clarkson Refinery and that it would be doing the job "maintenance". Referral slips signed by Joe De Wit and Earl Walsh, Business Agents of Local 95 at the time, bear the word "maintenance". It was their evidence that they did so because the person calling from Inscan to request men had told them the men were for a maintenance job. de Wit testified that it was not the Local's practice to check to see if a job was maintenance or construction when requests were received for men to be referred for maintenance work. This was because Local 95 covers the whole province and refers men to jobs anywhere in the province. Both de Wit and Walsh had been to the Gulf site and had seen the fire damage that insulators were working on for KLT before they referred

Inscan's insulators. They also knew that the insulators referred to KLT were being paid construction rates while working on the fire damage and that Inscan's insulators would be working on it as well. Walsh had written the notation "construction" on the referral slips of insulators whom he had dispatched to KLT.

7. Robert Beamish was Local 95's steward on the Inscan job and began work on it on April 10th. During two of the three prior years he had been employed by Local 95 as one of its business agents. He knew when he was dispatched to the job that Inscan was referring to the work as maintenance. Beamish testified that he had been on the job only a couple of hours when he concluded that the work was not maintenance. Approximately three days later, when he was appointed steward, employees began asking him why they were not being paid construction rates. He claims that, between April 10th and May 2nd he had four informal conversations with Inscan's foreman Frank Kapralik about the complaints which he was getting from employees concerning the rate of pay. Beamish states that, on May 2nd after an employee told him that he wanted a grievance filed, he called Taggart and asked for a business agent to be sent to the job site in order to file a grievance. He sent de Wit to the site. That visit was made on May 11th. According to Beamish, de Wit first toured the site, then spoke with Beamish and, together with him, went to see Kapralik. They told Kapralik that they were grieving at Step No. 1 of the grievance procedure that Inscan should be paying construction rates. Beamish said that he asked Kapralik to advise his office, but did not personally pursue the matter any further.

8. de Wit's testimony about the visit to the site on May 11th differs from Beamish's only to the extent that he recalls that the two of them toured the site together. de Wit reported the results of his site visit to Taggart and asked him to file a grievance. Taggart's response was for de Wit to make further investigations. He started by contacting Mr. A. Chartrand, a Vice-President of the International and a member of the General Presidents' Committee for Contract Maintenance in Canada ("the Presidents' Committee). The Presidents' Committee is a committee formed of the presidents of 11 international building trades unions affiliated with the Building Trades Department of the AFL-CIO together with the president of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers. It is responsible for administering or interpreting the "Definitions" article of a form of agreement referred to amongst the building trades unions as the Presidents' Agreement, although it is formally titled Project Agreement for Maintenance By Contract in Canada. One such document is an exhibit in these proceedings, being an agreement between Stearns Catalytic Ltd. ("Catalytic") and the aforesaid unions for maintenance work at Gulf's Clarkson Refinery. As a result of his conversation with Chartrand, de Wit contacted Robert Watson, Chairman of the Presidents' Committee. He spoke to other building trades representatives as well, including Joe Duffy who was President of Local 95 at the time and is also Secretary-Treasurer of the Ontario Provincial Building Trades Council.

9. de Wit sought Chartrand's interpretation of whether fire damage restoration work came under Local 95's construction or maintenance agreement. He asked Duffy whether he knew of any prior jobs in Ontario where fire damage had shut down an operating unit and it was repaired under a subcontract let by the owner pursuant to Local 95's maintenance agreement. Duffy's advice was that he was unaware of any, but that some companies like Catalytic had performed fire restoration work under project agreements. de Wit queried Watson on his and the Presidents' Committee's interpretation of fire restoration work and was advised by Watson that the project agreements have a section which refers to fire damage. It was into

the last week of May by the time de Wit had finished his various inquiries, reported the results to Taggart and repeated his request that a grievance be filed with Inscan. de Wit learned on May 31st that Taggart had resigned as business manager. de Wit became interim business manager of Local 95 on June 3rd. He addressed a letter dated June 5th to Inscan advising it that Local 95 was going to take the dispute over payment of maintenance rates on the Gulf job to the Board. Next he obtained a formal grievance letter dated June 7th from Local 95's solicitors and served it on Inscan. This formal grievance letter was referred to the Board eight days later.

10. At the same time that Inscan was obtaining insulators from Local 95 and performing its contract at Gulf, Local 95 and the Association were in negotiations to renew the construction and maintenance agreements. Local 95 sent to the Association separate notices of its "... intention to bargain for the renewal with revisions ..." of the construction and maintenance agreements. Each was dated January 24, 1984. de Wit was appointed by Taggart as chairman of Local 95's bargaining committee for both agreements and Local 95 tabled proposals on March 15th respecting both agreements. One of the proposals for revision to the maintenance agreement was that "On major shutdowns I.C.I. Sector conditions and rates of pay will apply." The parties had five meetings from January 10th to April 19th and reached a settlement on the construction agreement on that latter date. The same day they commenced bargaining on the maintenance agreement. A few days after May 7th they settled that agreement and it was signed prior to June 1st.

11. The evidence is in substantial conflict with respect to whether there was discussion of rates of pay for fire restoration work during the negotiations. John Beernink, Chairman of the Association's bargaining committee who testified on behalf of Inscan, stated that Local 95 representatives expressed their dissatisfaction at the April 12th bargaining meeting that Inscan was paying the rates of the maintenance agreement on the Gulf job. According to Beernink, Local 95 wanted to have the maintenance agreement amended to provide for the payment of construction rates on fire restoration work. At the April 19th meeting, after the construction agreement was settled, Beernink proposed that they deal with the maintenance agreement and settle it by adjusting the wages pro rata to the construction agreement. After an initial protest from Duffy that they were not there to bargain the maintenance agreement, they began to negotiate for its renewal. Beernink's testimony is that de Wit demanded that the agreement be amended to include specific wording requiring payment of construction wages on fire damage restoration and that this be agreed to before there be any settlement on wages and benefits. Beernink refused. At a meeting on May 7th, Beernink presented Taggart and Walsh with a draft maintenance agreement. A few days later that became the basis of the settlement. The only revisions to the expired agreement were in respect of wages and benefits which were pro-rated to the rates and benefits of the construction agreement.

12. de Wit and Duffy presented a different version of what was discussed in negotiations in their testimony. They claim that Beernink raised the maintenance agreement from time to time and, whenever he did, Duffy responded by saying that they were there to negotiate the construction agreement, not the maintenance one. Duffy has no recall of the Local 95 representatives making any reference at the April 12th meeting to fire restoration with respect to either collective agreement, or of Local 95 making proposals to do such work at construction rates. Duffy did not remain at the April 19th meeting after the construction agreement was settled. It was also Duffy's testimony that throughout the negotiations, Local 95 did not table any proposals to do with fire restoration and that members of Local 95's

bargaining committee did not participate in any discussions about fire restoration. de Wit also denies presenting any proposal for Local 95 dealing in any way with fire restoration, or that there was any discussion of fire damage restoration during bargaining about the construction agreement.

13. Inscan is not the only employer bound to Local 95's construction and maintenance agreements which has paid employees working on fire damage restoration according to the terms and conditions of the maintenance agreement. Ivan Hebert, Manager of the Asbestos Covering Company, Limited ("Asbestos Covering"), testified that it and his prior employer, Canadian Insulation Services ("C.I.S.") had employed insulators from Local 95 on fire damage restoration on four separate fires under the terms of the maintenance agreement, all without complaint from Local 95. Three of them were within the same compound at the Imperial Oil Limited refinery in Sarnia.

14. Asbestos Covering performed a contract for approximately \$50,000.00 to repair damage from a fire in the phenol plant which occurred as a result of an explosion as the plant was being started up after a maintenance shutdown in 1982. Asbestos Covering performed the repair of the fire-damaged insulation after the plant had been brought back into operation following the fire. C.I.S. also did fire damage repair in 1982 on separate fires on two separate power formers, each one a separate producing unit. These units were in the same compound as the phenol plant. The first power former fire did not shut down the unit and insulators were the only trade doing repair on it. The fire to the second unit occurred just prior to a scheduled maintenance shutdown, so the fire damage was repaired while the unit was shut down. In 1981, Imperial's wax plant was entirely disabled for 14 days as a result of a fire. C.I.S. worked two shifts of insulators 12 hours per day for 14 days in order to restore operations. Ninety per cent of the insulators were additional to C.I.S.'s regular maintenance crew and all were cleared through Local 95 for work on the project specifically for that project. The value of C.I.S.'s contract for the fire damage repair was approximately \$300,000.00.

15. C.I.S. and Asbestos Covering were working under regular maintenance contracts from Imperial when all four fires occurred. As noted above, the employees of the two companies who worked on the fire damage restoration were paid according to Local 95's maintenance agreement. Except for the wax plant fire, the employees who worked on the fire repair were some of the same employees who were doing the work covered by C.I.S.'s and Asbestos Covering's maintenance contract with Imperial. On the other hand, 90 per cent of the employees who worked on the fire damage repair at the wax plant were hired specifically for that work.

16. Beernink told Local 95's bargaining committee during negotiations that Association members had been doing fire restoration work under the maintenance agreement since the first agreement was signed with Local 95 in 1979. The statement was made in response to an assertion of the union at the April 12th meeting that construction rates and conditions should be paid for fire restoration work. When he was cross-examined on this exchange, he testified that Local 95 representatives had expressed dissatisfaction that Local 95's members were the only tradesmen working on the Gulf fire damage repair who were not being paid construction rates and conditions. When Beernink replied that Association members had been doing fire damage repair under the maintenance agreement since the first agreement, Local 95 did not challenge the Association's interpretation of the maintenance agreement, but the union did make an oral demand for a change to the agreement to have construction rates paid for such work.

Beernink also discussed the application of the maintenance agreement to fire damage repair on April 19th, the same day on which the Association and Local 95 reached agreement on the construction agreement. He was expressing his concern that, if the parties did not settle quickly the renewal of the maintenance agreement, some fire damage repair work at the Polysar plant in Sarnia would be done by Polysar's own forces instead of Local 95's members. Beernink testified that the Local 95 official to whom he addressed the remarks neither agreed nor disagreed with his suggestion that the work would be performed under the maintenance agreement.

17. As the Board noted earlier in this decision, in addition to the maintenance agreement between the Association, the International and Local 95, the Board has another maintenance agreement in evidence as an exhibit in the form of the agreement is formally titled "Project Agreement for Maintenance By Contract In Canada". It is styled as a Presidents' Agreement between Stearns Catalytic Ltd. and the twelve unions which comprise the Presidents' Committee, including the International herein. The agreement states that the parties have entered into it "...for the purpose of maintenance, repair and renovation work for Gulf Canada Limited located at Clarkson, Ontario.". The twelve unions enter into the same form of agreement with other employers who do industrial maintenance work under long term contracts. There is no evidence before the Board that Inscan is a party to a Presidents' Agreement. The Board also heard testimony about the Presidents' Agreement from William Warchow, Secretary-Treasurer of the Presidents' Committee and Robert Watson, an international representative on the committee for 18 years for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Their evidence was with respect to the definition of fire restoration as it appears in an interpretation contained in the Presidents' Agreement of that agreement's definition of maintenance work. The relevant wording is as follows:

Fire Restoration

The restoration of a plant completely destroyed by fire is considered construction work.

The restoration of a major part of a plant including several sections which have been destroyed or damaged by fire, shall be governed by the following criteria:

- (a) The removal of damaged equipment and the preparation of the damaged area to make it suitable for new equipment will be Maintenance.
- (b) The installation and erection of new equipment will be Construction.

When fire damage is localized to a given operating unit, such as a heater, distillation tower, compressor, pumphouse equipment and the like, then the restoration of same is to be considered Maintenance.

18. Turning now to the issues before the Board, it will deal first with the question of whether the work performed by Inscan at Gulf's Clarkson Refinery is work in the construction industry within the meaning of section 1(1)(f) of the Act. The section states as follows:

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

The Association and Local 95 have been before the Board previously in circumstances where the meaning of the word "repair" in the definition of construction industry was at issue with

respect to particular work in evidence before the Board. The Association was complainant, Local 95 was respondent and other parties were interveners in a complaint alleging that Local 95 had violated what is now section 148(1) of the Act by engaging in a selective strike; that is, a strike against certain employers under the provincial bargaining scheme and not others. The Board's decision is reported as *The Master Insulators' Association of Ontario Inc.*, 1980 OLRB Rep. Oct. 1477. The Board was required to distinguish between the meaning of the word repair as used in the definition of construction industry and the word maintenance as it is used in the construction and maintenance agreements. The maintenance agreement which was before the Board on that occasion was styled as a maintenance addendum to the construction agreement. The Board, for reasons set forth in another decision reported as *The Master Insulators Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1497, found that the addendum was "... a separate collective agreement covering maintenance work as opposed to the provincial collective agreement which covers work which includes work in the industrial, commercial and institutional sector of the construction industry.". The maintenance agreement before the Board herein is the third renewal of that agreement.

19. The Board, in the decision first referred to above, began its analysis of the distinction between repair and maintenance with the following observation at paragraph 21:

The distinction between "maintenance" and "repair" in the construction industry is not one which is easily made. While section 1(1)(f) of the Act defines "construction industry" and refers to "repairing", the words "maintenance" and "maintaining" do not appear in the Act...

The Board noted at paragraph 22 that it has regarded maintenance as not included in the section 1(1)(f) definition of construction industry and cited several Board decisions as authorities for that proposition. Nonetheless, the following passage quoted from paragraph 22 demonstrates that the Board, while certain that maintenance is not captured by section 1(1)(f) of the Act, is less certain about what constitutes "maintenance" and, therefore, is not "construction":

... [I]n *The Board of Governors of The University of Western Ontario* case, [1970] OLRB Rep. Oct. 776, the Board determined that the employer was not operating a business in the construction industry because the employees who were the subject of an application for certification were engaged in maintenance rather than repair. In the *Overhead Door Co. of Toronto Ltd.* case, [1974] OLRB Rep. July 482, the Board examined the business of an employer who was engaged in the sale, distribution, installation, maintenance and warranty of various types of wood and metal doors and concluded that whether "maintenance" is to be considered as part of "construction industry" depends on the type of "maintenance" being performed and on the context of a given employer's operations.

The Board next drew the following conclusions at paragraphs 28 and 29 about the work in evidence before it:

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility

either to operate efficiently or to attain its designed or production capacity and it to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility. However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134(a) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair". In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. *Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work.* "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

(emphasis added)

20. The Board, having found at paragraph 28 that the work at the Fearman and Stelco plants was work within the ICI sector of the construction industry and the remaining work was to be regarded as maintenance work, seems to be offering in the emphasized words in paragraph 29 a definition of maintenance and repair by which to distinguish the remaining work from work which might be captured by the word "repair" in section 1(1)(f). Since the Board ultimately found that the remaining work, which it regarded as maintenance work, was not captured by the scope clause of the provincial collective agreement, that is the construction agreement, it is reasonable to conclude that it also was not captured by section 1(1)(f). It is no less reasonable, then, to conclude that repair work defined as work "... necessary to restore a system or part of a system which has ceased to function or function economically ..." is captured by the section 1(1)(f) definition of construction just as certainly as it captures work "... which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.". Those were the words which the Board used in paragraph 28 of its decision to distinguish the work it regarded as "new construction" from the rest of the work which it regarded as maintenance.

21. The definition of repair work as work necessary to restore a system or part of a system which has ceased to function or function economically certainly fits the work performed by Inscan at the Clarkson Refinery. Richard Ives' graphic description of the fire damage to the hydrotreater was that both stages of the unit were producing product the day before the fire and incapable of producing it the day after. It was three weeks before the second stage could produce its normal product. There is no doubt that the hydrotreater ceased entirely to operate for three weeks. The installation by Inscan of the replacement insulation on piping and equipment was part of the exercise of restoring normal function to both stages of the hydrotreater. That is work in the construction industry as defined in section 1(1)(f) of the Act and clearly is work within the industrial, commercial and institutional ["ICI"] sector of the industry.

22. The Association is a designated employer bargaining agency under the province-wide

provisions of the Act and Local 95 and the International together are a designated employee bargaining agency. By operation of section 146(2) of the Act the only agreement or arrangement which they can make respecting work in the ICI sector of the construction industry is a provincial agreement as defined in clause (e) of section 137(1) of the Act. It is undisputed that the construction agreement includes work in the ICI sector and is a provincial agreement within that definition. Therefore, it is the only collective agreement which the Association and Local 95 can have between them respecting work in the ICI sector. It follows that the maintenance agreement cannot be an agreement respecting work in the ICI sector. Thus, Inscan was bound to apply construction agreement to the work it performed at Gulf. To the extent that it failed to do so, Inscan has violated the construction (provincial) agreement between The Master Insulators' Association of Ontario Inc. and the International Association of Heat and Frost Insulators and Asbestos Workers, and International Heat and Frost Insulators and Asbestos Workers, Local 95.

23. In the event the Board should find Inscan's work at Gulf to be ICI construction covered by the construction agreement, counsel for Inscan argued in the alternative that Local 95 ought to be barred from claiming any damages under the construction agreement on equitable grounds of delay and estoppel.

24. Counsel's argument that Local 95 is estopped from claiming damages for Inscan's breach of the construction agreement, as the Board understands it, may be summarized as follows. Counsel referred the Board to two reported decisions respecting application of the concept of estoppel: *New Vision Construction Limited*, [1983] OLRB Rep. Mar. 428 and *Losereit Sales and Services Ltd.* [1983] OLRB Rep. Apr. 569. Both decisions deal with referrals of grievances under section 124 of the Act. In *Losereit* the Board adopted the three elements essential for the application of promissory estoppel at common law. They are (1) a finding that there has been a representation by words or conduct intended to be relied on by the party to which the representation was directed; (2) some reliance on the representation in the form of some action or inaction; and, (3) detriment resulting from reliance on the representation. The Board also adopted the proposition from arbitral jurisprudence that "acquiescence or inaction can have the effect of a 'representation'". Counsel contends that there was a representation to Inscan that fire damage restoration could be performed at the wages and working conditions contained in the maintenance agreement and the representation was created by a number of factors: the existence of the maintenance agreement and its link to the General Presidents' Agreement which deals with fire restoration work; the fact that Inscan, the Association, its member contractors, Local 95 and its officials were *ad idem* when Inscan was on the Gulf project, that fire damage restoration work was done under the terms and conditions of the maintenance agreement; Local 95's "inaction" for more than two months during which it failed to assert a claim that the work should be done under the terms and conditions of the construction agreement; and the past practice of contractors bound to the construction and maintenance agreements doing fire damage restoration work under the terms and conditions of the maintenance agreement.

25. The Board does not agree with counsel that the mere existence of the maintenance agreement, whether or not linked to the Presidents' Agreement and its definition of fire restoration work contained in the extract quoted above from that agreement, is sufficient to establish the representation counsel seeks to establish without some evidence that the maintenance agreement has been applied to the work in question. Nor does the Board share counsel's view that the evidence establishes that Local 95 and its officials were *ad idem* with

Inscan and others that fire damage restoration work was done under the terms of the maintenance agreement. Taking the evidence at its highest, it still shows the officers of Local 95 to have been uncertain about which agreement applied to the work. With respect to Local 95's failure during more than two months to assert a claim that the work should be done under the terms and conditions of the construction agreement, counsel submits that this "inaction" constitutes acquiescence in a practice. Clause 6.04 of the grievance procedure in the construction agreement gives the parties bound by it 90 days within which to refer a grievance under section 124 of the Act. In that circumstance it cannot be said that a party which asserts a claim within the time limit has acquiesced in a practice because it has used that time to decide whether it had a claim. That leaves the alleged past practice of doing fire damage repair under the terms and conditions of the maintenance agreement.

26. The only specific evidence before the Board of a past practice of applying maintenance terms and conditions to fire repair work is that of Hebert's with respect to the four fires at Imperial Oil Limited's Sarnia refinery. There is no evidence that Inscan previously had done such work under those terms. Beernink's evidence is limited to a general claim that fire restoration work has been performed under the maintenance agreement since the first agreement was signed in 1979. That may be so, but, if it is, the only specific evidence in support of the claim is the evidence of the four fires in Sarnia. While it might be arguable that there has been an area practice in Sarnia of performing the work on maintenance conditions, it stops well short of demonstrating anything more widespread. It may also be that there have not been many fire restoration jobs to do and that the four examples are representative of a past practice. Again, if that is the case, the Board does not have that evidence before it. The caution with which arbitrators have applied estoppel in circumstances where an established work practice forms the basis of the promise or representation places a substantial onus on the party seeking to establish the estoppel to adduce evidence which clearly establishes the practice. See Brown and Beatty, *Canadian Labour Arbitration* (2d ed Aurora: Canada Law Book Limited, 1984) at page 86. The evidence before the Board does not establish clearly that there is a past practice amongst contractors bound to the construction and maintenance agreements between the Association, the International and Local 95 of applying maintenance terms and conditions to fire damage repair work, or a practice amongst Toronto area contractors, or that Inscan has a practice. Therefore, in the Board's view, the facts of this case do not establish the representation essential to the application of estoppel and the doctrine is not applicable to this application.

27. With respect to the contention that Inscan should be relieved of any award of damages against it because of Local 95's undue delay in bringing the grievance, counsel for Inscan argues that Local 95 was clearly aware of a potential grievance against Inscan virtually from the start of its Gulf project on April 2nd, but delayed filing it until June 8th, Inscan's last day on the project. The alleged prejudice to Inscan flowing from that delay is that it was denied any chance of trying to limit its liability by seeking to re-negotiate the terms of its contract, or by employing extra insulators in order to curtail overtime. Assuming, without finding, that Inscan had no opportunity between April 2nd and June 8th to know of or evaluate whether it was facing a risk of potential liability under the construction agreement, the Board is not satisfied that the circumstances present in this case warrant mitigating the damages which otherwise might be assessed against Inscan. Whether to mitigate damages on the ground of delay is in the Board's discretion. The construction agreement, as the Board noted above in dealing with Inscan's estoppel argument, gives the parties 90 days in which to refer a grievance for final and binding arbitration under section 124 of the Act. That is a condition on which

the Association, the International and Local 95 have agreed and it is binding on Inscan and Local 95, amongst others. It might be argued that, for the purposes of deciding whether delay warrants mitigation of damages, the Board is not bound by the time limit because the grievance is brought under section 124 "... [n]otwithstanding the grievance and arbitration provisions ..." of the construction agreement. Even so, in order for the Board to be persuaded by the argument that Local 95 should be denied damages where its grievance was filed at least three weeks before the expiry of the time limit, the Board would, for example, at least want to have evidence that Local 95 had acted purposely to use the time limit in order to file the grievance after the job was finished, or had squandered the time without investigating the potential grievance, or had otherwise substantially abused the time limit to Inscan's detriment. The evidence herein does not support such conclusions. Accordingly, the Board will not mitigate for reasons of delay any damages to which Local 95 might be entitled.

28. In summary, for all of the foregoing reasons, the Board finds that Inscan has violated the construction agreement between the applicants and the Master Insulators' Association of Ontario Inc. in effect at the time of Inscan's project at the Clarkson Refinery of Gulf Oil Limited. The Board remains seized with respect to the amount of damages should the parties to this application be unable to settle the amount.

CONCURRING OPINION OF BOARD MEMBER I. M. STAMP;

1. I concur with the conclusions reached by the Board based on the evidence before it. I am concerned, however, with an aspect of delay which is not dealt with in the decision. Taggart, De Wit and Walsh all testified that they were certain from the start that the job was construction. Before Inscan had been on the job a week, they knew its insulators supplied by Local 95 were being paid maintenance terms and conditions and that KLT was paying construction terms and conditions. Their demeanor as witnesses in that respect is in stark contrast to the length of time it took for them to file the grievance. This is not by way of criticizing Local 95 for investigating the grounds for a grievance, but, if its three officials were so convinced that the work was construction, why did they not file the grievance right away and use the investigation to "prepare their case".

2. The concern which their conduct raises is that some ulterior motive underlays the delay. Certainly that is Inscan's perception of their conduct and conduct which allows that perception can only have a corrosive effect on the prospects for sustaining the trust and co-operation essential to an effective collective bargaining relationship.

1154-85-R London and District Service Workers' Union, Local 220, Applicant, v. Kitchener Waterloo Hospital, Respondent

Employee - Board reviewing criteria for managerial and confidential exclusions - Employer evidence indicating newly hired person expected to perform confidential functions within meaning of s.1(3)(b) - Person excluded where evidence uncontradicted although speculative

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members I. M. Stamp and B. L. Armstrong.

DECISION OF THE BOARD; May 27, 1986

1. This is an application under section 106(2) of the *Labour Relations Act*. A question has arisen between the parties concerning the status of Ms. S. Curwood, described as the "payroll supervisor". The employer asserts that Ms. Curwood's functions fall within the parameters of section 1(3)(b) of the *Labour Relations Act*. The union asserts the contrary. Section 1(3)(b) reads as follows:

1-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

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(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

If, in the opinion of the Board, Ms. Curwood does exercise "managerial functions" or is employed in a confidential capacity in matters relating to labour relations she must be excluded from the bargaining unit represented by the union.

2. In accordance with the Board's usual practice in these matters, the Board appointed an Officer to inquire into the duties and responsibilities of the disputed individual. Pursuant to that appointment, the Board Officer convened a meeting of the parties on the premises of the employer. At that meeting both parties were represented by counsel or agent, and were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence which, they asserted, might bear upon the issues before the Board. At the completion of this examination the parties were asked if they had any further evidence or witnesses that they wished to call, and each party indicated that it did not. The evidence adduced was transcribed and reproduced, verbatim, in the Officer's report which was circulated to the parties for comment. Accompanying the report was a notice extending them the opportunity to make representations as to the accuracy of the report or the conclusions that, in their submission, the Board should reach in view of the contents of the report.

3. We do not think that it is necessary to reproduce here the details of the witnesses' testimony, nor refer to the many cases in which the Board has dealt with the application of section 1(3)(b) of the Act (see generally, J. Sack, Q.C. and C.M. Mitchell, *Ontario Labour Relations Board Law and Practice*, 1985 (Butterworths) at pp. 79-103). It suffices to say that

on the first branch of section 1(3)(b), what the Board is trying to assess is the degree and exercise of authority over other employees which would affect their economic position or job security, since the exercise of such authority, to any significant extent, would be incompatible with participation in the bargaining unit. The Board's approach to this part of section 1(3)(b) was elaborated in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 in a long passage to which we might usefully refer:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 CLRB at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

3. The *Labour Relations Act* does not contain a definition of the term "managerial

function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the results in every situation, and in assessing each case, the Board must have due regard to the nature of industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced persons will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The

situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the management line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to, titles alone are not much assistance in determining what a person's functions really are...

The cases cited above would seem to indicate that while a person may have minor supervisory functions or very limited confidential functions in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b)).

6. It should always be remembered, however, that *The Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent upon any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*, 56 DLR (2d) 193.) Furthermore, (and in addition to the usual rule that "he who asserts must prove"), a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

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7. We can summarize these general approaches then, as follows:

- (1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.

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- (4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.
- (5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide *concrete examples* of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a "participatory decision-making style". Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

4. The second branch of section 1(3)(b) has a similar collective bargaining purpose: to exclude from a bargaining unit persons who have access to confidential material relating to labour relations, so that the employer can know that its internal strategies and communications are known and handled exclusively by persons of undivided loyalty (see *Town of Gananoque*, [1981] OLRB Rep. July 1010). Access to information which may be "confidential" is not, by itself, sufficient to exclude an employee from the application of the Act since what is important is not the confidentiality of the information, but rather its labour relations content and potential collective bargaining use. For example, the secretary to the industrial relations manager may have no independent managerial authority, but may still be privy to the employer's collective bargaining strategy or other sensitive labour relations information. At its most prosaic level, even a clerk or stenographer who takes minutes at a management meeting to plan the employer's collective bargaining posture should not be faced with a potential conflict of loyalty because of his/her membership in the bargaining unit. However, as the Board indicated in *York University*, [1975] OLRB Rep. Dec. 945:

...the Board must be satisfied of "a regular, material involvement in matters relating to labour relations" to justify a finding excluding a person from operation of the Act. (See, *The*

Falconbridge Nickel Mines Ltd. case, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case, [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed "confidential" in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case, [1974] OLRB Rep. May 291.) The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See, *The Toledo Scale Division of Reliance Electric Limited* case, [1974] OLRB Rep. June 406).

5. The handling of collective bargaining information must be at the core of the disputed individual's job functions. An occasional or peripheral involvement is insufficient to justify exclusion from the bargaining unit. As the Board observed twenty years ago in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379:

A person to be excluded under this provision must be employed "in a confidential capacity", i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily be seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.

The application of this enunciated "test" to the facts in *Frito-Lay Canada Ltd.*, [1978] OLRB Rep. Sept. 831, prompted this comment from the Board.

While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial relations strategy, and the Board must conclude that these employees are not employed in a confidential capacity in matters relating to labour relations.

6. The decision of the Canada Labour Relations Board in *Transair Ltd.*, 74 CLLC ¶16,111, which was considered by the Supreme Court of Canada in *CLRB v. Transair Limited and Canadian Association of Industrial Mechanical and Allied Workers, Local No. 3*, 76 CLLC ¶14,024, elaborates at some length upon the kind of information which, if disclosed, would be prejudicial to the employer's collective bargaining interests. Although some allowance must be made for the different statutory and business context in which that decision was made, we are satisfied that the CLRB's description provides a useful summary of the kind of collective bargaining information which, *mutatis mutandis*, must be regarded as "sensitive" in the collective bargaining sense contemplated by section 1(3) of our Act. At pages 911-912, the Board sets out a number of relevant considerations:

(b) "...in matters relating to industrial relations" means having access to information relating to such matters as contract negotiations; for example, the persons that sit together to establish, on behalf of management, the range of salary increase that the bargaining team will be mandated to operate within at forthcoming negotiations; or to such matters as the proceedings before a Board like this one: for example, the persons that sit together and plan the strategy which the employer will use as well as the tactics used in the pursuance of its

legitimate interest before a Labour Board; or to such matters as the disposition of grievances: for example the persons who plan or who know what compromise will be offered to a grievor.

(c) The access to this information must not be incidental or accidental. It must be part of an employee's regular duties. If the main function of the employee is not related to matters relating to industrial relations, that employee cannot be excluded.

Therein lies a serious matter of judgment and fairness on the part of employers. If management chooses to openly hold discussions in matters related to industrial relations where they could be easily overheard or if management keeps documents of the same nature, in a place where an unauthorized person may inspect them at will, this is no cause for excluding these persons. As an example, if management decides to give keys to files in the personnel department containing data on forthcoming negotiations to all of its clerical employees, this would not make all of them confidential employees in matters relating to industrial relations.

(d) Disclosure of the information to which these persons have access must have an adverse effect on the interests of the employer. The interests of the employer concerned here however, must be interests in industrial relations. In other words, the disclosure of a written reprimand deposited in the personal record of an employee by somebody in a clerical function to union representatives does not have an adverse effect on the interests of said employer where the collective agreement stipulates that concomitant with such deposit in the file, a copy must be forwarded to the employee concerned and/or to the union. On the other hand, disclosure by an employee of information he has access to concerning secret manufacturing process to competitors might well be a breach of confidence and loyalty on the part of that employee but has nothing to do with industrial relations.

(e) On the other hand, one must attach great importance to the absolute necessity for an employer to be capable of operating efficiently and therefore to have the essential number of employees administering industrial relations to assure efficient management in this connection. Employees who are solicited for and accept functions with a company which make them an essential part of that autonomous team which has to administer labour relations, must realize that they will be by the same token deprived from ever aspiring to the acquisition of bargaining rights.

Moreover, a distinction was drawn by the Supreme Court of Canada between matters relating to "industrial relations" and matters relating merely to "personnel information". Spence J. put it this way:

The position of the personnel records clerk, however, requires further examination. A perusal of the reasons for judgment delivered by Chief Justice Jackett in the Federal Court of Appeal shows that, in my view, his interpretation of the words of s. 118(p)(ii) of the *Canada Labour Code*, R.S.C. 1970, c.L-1, i.e., "a person performs management functions or is employed in a confidential capacity in matters relating to industrial relations", accorded with that of the Canada Labour Relations Board, i.e., that the person so to be excluded was one who had confidential knowledge of the conferences of management in reference to industrial relations. The Chief Justice of the Federal Court of Appeal was of the view that the evidence as to the job description of the personnel records clerk brought her within that class. However, the evidence of Mr. L.J. Sinnott for the respondent shows that, in fact, that part of her duties consisted of attending meetings between labour unions and managerial officers taking minutes of those meetings and distributing them to those who had attended. There could be nothing confidential in that duty as, of course, both management and unions were present at the conferences and the minutes simply stated what had been said and done in the presence of them both. Of course, the duties of this clerk as to personnel records were highly confidential but they were not confidential in reference to industrial relations, only as to personnel relations. Therefore, in my view, there was evidence upon which the Canada Labour Relations Board could properly include the personnel records clerk in the appropriate unit and the appeal, considering it as I do as an appeal of the union, should be allowed to the extent that the inclusion of this clerk within the union was appropriate.

7. The difficulty in the present case is not in establishing the appropriate indicia, which, if present, would establish that the disputed individual should be excluded from the bargaining unit either on a "managerial" basis or "confidential/labour relations" basis. The problem here is to unravel the testimony and determine whether Ms. Curwood's duties actually bring her within the above-mentioned parameters. Here there is a problem (unfortunately, not unique to this case): Ms. Curwood has been in her present job for only six months and may not as yet have had the opportunity to actually exercise the full range of her duties. It is not to be expected that hiring, firing, promotions, etc. will occur every day, nor in the absence of the passage of a sufficient period of time for there to have been some employee grievances or periodic rounds of collective bargaining, is it easy to say whether someone would necessarily be regularly and materially involved on behalf of the employer in these labour relations activities. The Board has never shrunk from its obligation to render the opinion required of it under section 1(3)(b) of the Act, but in circumstances where the individual is occupying a new job the Board has frequently warned the parties their request for its opinion may be premature and may not be determinative. An opinion based upon incomplete information or experience may not provide a final resolution of the parties' concerns and may simply generate another reference under section 106(2) when there is a sufficient body of experience to make a more accurate assessment. That is why the Board, through its officers frequently advises parties to wait before seeking the opinion of the Board under sections 106(2) and 1(3)(b) of the Act. Moreover, section 106(2) of the Act recognizes that business organizations and managerial structures can change over time. Jobs evolve. Functions which attract the concern to which section 1(3)(b) is directed may, in practice, be added or deleted from an employee's regular duties even if there is no formal change in his job description. In the Board's experience, a written job description can sometimes be a quite misleading indication as to what the employee actually does from day to day, but until there is a body of experience with which to compare it, it may be all there is - particularly for new jobs or new incumbents.

8. With these reservations, we turn, briefly, to the facts.

9. According to Ken West, the assistant director of finance, the payroll supervisor position was created because of a change in his own responsibilities. As he was withdrawn from direct supervision of the activities of the payroll department, he needed someone else to take his place. He said that he needed someone to deal with day-to-day supervision, scheduling, performance reviews, recommendations regarding hiring, internal monitoring procedures, and so on. These functions to be performed by the payroll supervisor are reflected in her job description which includes the following purported duties:

2. Instruct, direct and schedule time and workload of payroll staff; ensure continuous coverage in payroll department.
3. Hire, discipline and evaluate performance of payroll staff and making recommendations where standards are not met.
4. Assist in salary budget preparation and analysis during the year.

10. These general statements do reflect the kind of authority that a foreman or supervisor in a commercial enterprise would typically have with respect to his subordinates, but the evidence here is that Ms. Curwood works in conjunction with only one full-time and two part-time employees and has not actually *exercised* such authority. Obviously, there is no immutable

ratio of “managers” to “employees”, but, as the Board indicated in *The Corporation of the City of Thunder Bay*, *supra*, the fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status. Having regard to the collective bargaining purpose of section 1(3)(b) it would take very clear evidence or a very unusual business organization before the Board would be persuaded that “managerial” authority had really been diluted to the extent that every two or three employees have a “manager”. It may be that small work groups will have a senior employee, “lead hand” or “team leader” who performs certain coordinating and minor supervisory functions, but the Board has never considered such role to be “managerial” in the sense contemplated by section 1(3)(b) - especially when the next or real level of management is quite close.

11. Ms. Curwood has not hired, fired, disciplined, demoted, or evaluated anybody. She testified that she had seen the form of the employee evaluation but had never done one, and there is no evidence to indicate whether such evaluation would have any adverse or positive effect on an employee’s career advancement, wages or prospects, nor who would effectively make that decision. There is no evidence, for example, that Ms. Curwood has ever made an unfavourable evaluation or that such evaluation has ever rebounded to the detriment of the employee being evaluated. We are reminded here of the Board’s comments at item 5 of the summary in *The Corporation of the City of Thunder Bay*, *supra*.

12. Disciplining employees is clearly a “management function”, and there is no doubt that some of the *documentary* evidence suggests that Ms. Curwood has this authority. (See the portion of the job description set out above.) The problem is that there is no evidence that Ms. Curwood has ever exercised such authority, either directly or by “effective recommendation”. The extent of “discipline” that she has imposed has never extended beyond a comment that the employee should try to improve some aspect of her performance. In fact, at one point in her testimony Ms. Curwood said that she had never reprimanded any employee, although later she said she had warned an employee that she (the employee) should not be late for work. She certainly has never *exercised* any of the disciplinary authority typically exercised by “foremen” in an industrial setting or “supervisors” in a white-collar setting - the kind of disciplinary penalty which could give rise to a grievance if the employees were covered by a collective agreement.

13. Ms. Curwood’s authority to grant casual time off has never exceeded a few hours for a doctor’s appointment (or similar engagement) and she has had no involvement in grievances, collective bargaining matters or negotiations. She has no decisive authority over the scheduling of vacations, the taking of days off, or the training of employees. While she said that 90-95 per cent of her time was spent “supervising”, the one full-time and two part-time employees in her group, that submission is clearly impossible to reconcile with the other (non-managerial) responsibilities which she described. Obviously, she is intimately involved in performing the same kind of work that the other employees are doing.

14. Ms. Curwood may have more knowledge, experience or seniority than the other employees. She may have a better understanding of the employer’s requirements. She may help co-ordinate the activities of the other three employees with whom she works. But none of those activities establish “managerial responsibilities” within the meaning of section 1(3)(b) of the Act - although they are no doubt important ones and even in a collective bargaining framework, warrant a salary which reflects these added responsibilities.

15. On the basis of the totality of the evidence before us, we cannot conclude, and it

is not our opinion, that Ms. Curwood exercises managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*. The evidence, in our view, is simply not there. Having regard to the purpose of section 1(3)(b), Ms. Curwood does not exercise the kind of decisive authority over the lives of the three individuals with whom she works which would warrant exclusion from the Act or the bargaining unit.

16. The second branch of section 1(3)(b) is much more difficult, and the evidence points in the other direction. That evidence, we should note, is uncontradicted and, perhaps, cannot be contradicted until Ms. Curwood has been in her job for a longer period of time.

17. According to Mr. West, Ms. Curwood is expected to be involved in, and has been involved in, discussions concerning upcoming wage increases to Hospital staff. She does not make the decisions about what such increases should be, but she is involved because any wage or benefit changes, in a large organization, require planning to ensure that they can be properly implemented. She would be involved in such wage changes in order to assist the Hospital to determine the appropriate implementation dates, and how the rates or percentage increases are administered. In this respect, the evidence suggests that Ms. Curwood is not involved solely in the mechanics - processing the wage or benefit changes decided upon by others - but in advising those decision-makers about the implementation and practical consequences of their decisions. According to Mr. West, she would also be involved in the budget-making process, to apply *proposed* rates of pay to department hours to arrive at the total wage bill.

18. This evidence is a little "thin", for the reasons set out above, but obviously foreknowledge of anticipated or proposed wage increases or salary projections is the kind of information which is or could be reasonably connected to the collective bargaining process. Ms. Curwood may not make collective bargaining decisions (and probably would not), but to the extent that she performs an advisory role or support function, she should properly be regarded as employed in a confidential capacity in matters relating to labour relations. We recognize that on this second branch of the 1(3)(b) test, the Hospital's evidence is somewhat speculative because, in only six months, Ms. Curwood may not have had the opportunity to carry out the full range of her responsibilities, but as we have already pointed out that evidence is uncontradicted. It meets the "mischief" concern underlying the second branch of section 1(3)(b).

19. For the foregoing reasons, and on the basis of the evidence currently before us concerning Ms. Curwood's duties and responsibilities, we are of the opinion that she must be excluded from the bargaining unit having regard to the provisions of section 1(3)(b) of the *Labour Relations Act*. This opinion is, of course, subject to the concerns and qualifications mentioned above.

0545-86-U Monarch Fine Foods Company Limited, Applicant, v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, Randy Doner; Michael Reid; Arthur Morley; Ronald Debartok, Steve Sajbic and Alice Gralek, Respondents

Strike - Definition of "strike" in Ontario - Board reviewing remedies available to employers where unlawful strike occurs

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: Brian P. Smeenk, D. Dobin and D. Fisher for the applicant; Harold Caley for the respondents (appearing under protest).

DECISION OF THE BOARD (ORALLY); May 28, 1986

1. This is an application under section 92 of the *Labour Relations Act* alleging that a group of the applicant's employees have engaged in an untimely and unlawful strike, and further that the Union and certain Union officials have encouraged, supported or counselled that illegal activity. It is not disputed that the parties are currently engaged in collective bargaining and that the "no board report" referred to in section 72 of the Act has not been released by the Minister of Labour. Accordingly, no lawful strike can take place at this time.

2. The definition of "strike" is found in section 1(1)(o) of the Act which reads as follows:

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

3. It is not necessary to engage in any extensive review of the law. The section speaks for itself. It prohibits *any form of collective action* until the collective agreement is no longer in operation and the conciliation process has been concluded (see section 72). The strike definition covers "ordinary strikes", boycotts, slowdowns, study sessions, calling-in sick, or any other type of concerted employee refusal - including a boycott of overtime. Employee motive is irrelevant as the Board held, and the Supreme Court of Ontario confirmed more than ten years ago, in *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569 upheld 78 CLLC ¶14,135. It does not matter whether the employees are seeking any benefit for themselves, are protesting some employer action, or are simply acting out of a sense of solidarity. In Ontario, such conduct is illegal. Any concerns which employees may have, must be addressed at the bargaining table or through the grievance procedure.

4. The *Labour Relations Act* is concerned, for the most part, with the rights of employees. It guarantees the right to organize a union. It requires the employer to recognize that Union. It protects employees and Union officials from reprisals. It obligates the employer to bargain in good faith with a view to concluding a collective agreement. It ensures the preservation of bargaining rights and the collective agreement when an employer sells his business. Indeed, it is sometimes said that there is not much in the *Labour Relations Act* dealing with the rights of employers.

5. But in fact there is: there is an absolute guarantee of industrial peace during the life of the collective agreement, and until the parties have gone through the compulsory conciliation process. That is why the definition of "strike" is so broad, and that is why, under the Act, an employer has a broad range of remedies or options when faced with an unlawful strike - just as the employees have a broad range of remedies if they are dealt with improperly. Most employers do not exercise the full range of those rights unless they are forced to do so, but it may be worthwhile to mention what they are:

- (1) Under section 92 an employer can seek a cease and desist order enforceable in the Supreme Court of Ontario as an Order of that Court. Disobedience can result in fine or imprisonment.
- (2) An employer may seek damages at arbitration for any lost profits.
- (3) An employer can discipline employees who engage in unlawful concerted activity because engaging in a strike is a serious breach of their employment obligations which warrants at least discipline and, in the view of some arbitrators, discharge.
- (4) The employer may seek consent to prosecute and subsequently prosecute employees or the trade union for their breach of the law. A strike is not just a private protest. It is contrary to the *Labour Relations Act*. A successful criminal prosecution may result in fines of up to \$1,000 per day for employees and \$10,000 per day for the Union.

6. I mention these matters simply by way of background to the present case which I am pleased to note the parties have resolved without the need of a formal hearing. Having regard to the representations of the parties, I find and declare that certain of the applicant's employees have engaged in an overtime boycott which constitutes an unlawful strike contrary to section 72 of the *Labour Relations Act*.

7. I note for the record the agreement of the respondent trade union officials that they will not counsel, encourage, procure, support, or condone such unlawful activity or a continuation of such activity - let alone participate in it themselves.

8. I further note the undertaking of the union officials that they will advise all interested employees that they are not to engage in a concerted boycott of overtime and that it is unlawful for them to do so. To this end, the Union agrees that it will provide copies of this decision to the employees in the bargaining unit.

9. This decision is made without prejudice to the employer's right to pursue such remedies as may be legally available to it and, without restricting the generality of the foregoing, to return to the Board on twenty-four hours' notice to the respondents and their solicitors, to seek such further redress under section 92 as the Board may deem appropriate. The parties also reserve all rights and defences in respect of the outstanding grievance dated April 29, 1986.

10. The employer has indicated to the Board that the company will not take disciplinary

action against any individual employee for anything occurring up to the date hereof, provided that there is no repetition or continuation of his unlawful conduct as referred to above.

2445-83-M Ontario Sheet Metal Workers Conference, Applicant, v. **Ontario Hydro**, Respondent

Construction Industry Grievance - Practice and Procedure - Whether rule permitting addition of parties applicable in s.124 proceedings - Third party having contractual or proprietary rights under contract with employer - Whether having status to intervene as party as of right - Board having discretion to grant status - Discretion not exercised in circumstances

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *S.B.D. Wahl* and *George Ward* for the applicant; *Harvey A. Beresford*, *Steven L. Moate* and *W. S. O'Neill*; *Marc J. Somerville*, *Ian S. Campbell* and *Bob Goel* for 3-L Filters Limited.

DECISION OF THE BOARD; May 12, 1986

1. The applicant ("the union"), on behalf of Ontario locals of the Sheet Metal Workers' International Association, and the Electrical Power Systems Construction Association ("EPSCA"), an association of employers engaged in construction work in the electrical power systems sector of the construction industry, are parties to a first collective agreement ("the collective agreement") with effect from May 1982 to April 1984, in which EPSCA recognized the union as the exclusive bargaining agent for certain classifications of sheet metal workers engaged in construction work performed on Ontario Hydro property. Ontario Hydro ("Hydro") is one of the employers bound by the collective agreement.

2. After the collective agreement came into force, Hydro entered into a contract with 3-L Filters Limited ("3-L") for the purchase from 3-L of certain equipment - heavy water vapour recovery dryers - for use by Hydro in the construction of its Darlington nuclear generating station. The contract is a sizeable one, involving payment of several million dollars for the fabrication of units which are to be delivered at various times over a five year period. The performance of work under this contract has already begun, and the applicant says that 3-L's employees are performing sheet metal work of the sort contemplated by Article 18 of the collective agreement, which provides:

18.1 Where the word "shop" is used in this Article, it shall be defined as a sheet metal shop under Agreement with the Sheet Metal Workers' International Association or one of its Local Unions or the Ontario Sheet Metal Workers' Conference. It being understood that such shops shall be shops using the yellow label of the International Association.

18.2 All sheet metal work at the option of the Employer shall be fabricated on the job site or in a shop.

- 18.3 Notwithstanding section 18.2 above, EPSCA and the Union acknowledge that packaged equipment, catalogue items and engineered assemblies may be supplied for installation. Such packaged equipment, catalogue items and engineered assemblies shall be installed by members of the Union in accordance with their jurisdiction as provided for in Article 8, Work Assignment, of this Agreement.
- 18.4 Both EPSCA and the Union acknowledge that situations may arise where the terms packaged equipment, catalogue items or engineered assemblies may require interpretation. In such circumstances, this matter will be immediately referred to a permanent review panel consisting of three (3) members appointed by the Union and three (3) members appointed by EPSCA.
- 18.5 Nothing in this Collective Agreement shall be taken to interfere with the existing divisions of work in the plants of the employer or affiliated companies, or as established between the Sheet Metal Workers' International Association and other certified or recognized unions operating in the plants where special building products are produced.

3-L is not party to any collective agreement with the applicant or the Sheet Metal Workers International Association or one of its constituent local unions. In August 1983, the applicant filed a grievance under the collective agreement, alleging that these circumstances constitute a violation by Hydro of the collective agreement. Representatives of the applicant and respondent met thereafter in an unsuccessful attempt to resolve the grievance. On January 26, 1984, the applicant referred its grievance to this Board for arbitration pursuant to the provisions of section 124 of the *Labour Relations Act*, R.S.O. 1980, c. 228, as amended ("the Act"). The relevant portions of that section are as follows:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

3. The hearing of this referral was first scheduled for February 9, 1984, but the parties agreed to adjourn the hearing *sine die* pending further efforts at settlement. Those efforts were ultimately unsuccessful, and the hearing of this referral began on July 17, 1984. Counsel then spent some time defining for us the issues of fact and law which might have to be determined in these proceedings. The issues as the parties defined them can be organized into two categories. Issues in the first category address the question "what are the enforceable employer obligations under the collective agreement with respect to shop fabrication of sheet metal components?" Issues in the second category address the question "do the circumstances of

Hydro's contract with 3-L and of the performance of that contract fall within the scope of the employer's responsibility under the collective agreement, so as to amount to a breach by Hydro of that obligation?" The text of Article 18 of the collective agreement appears in two documents said by Hydro to be relevant issues in the first category. The first is a "Memorandum of Agreement" executed on October 20, 1982, by representatives of the union and EPSCA. The second is a "collective agreement" executed on December 21, 1982, after the first document was ratified. As it appeared in the Memorandum of Agreement, Article 18 had appended to it the following note:

Provisions of Article 18 will apply to all sheet metal goods and material purchased from tenders with a closing date of November 20, 1982, or later.

That note does not appear in the text of Article 18 as it appears in the document executed December 21, 1982. Hydro takes the position that its contract with 3-L resulted from a tender with a closing date prior to November 20, 1982. It says that the note which appeared in the Memorandum of Agreement forms part of the collective agreement between the parties, arguing that a collective agreement may be found in two or more documents and that, in all the circumstances, the Board should conclude in this case that the documents executed October 20 and 21, 1982, together constitute the parties' collective agreement. The union's position is that the document of December 21, 1982, alone constitutes the collective agreement between the parties. Hydro argues in the alternative that, if the union is right on the first issue, the Board has the jurisdiction to rectify the parties' agreement and should exercise it in this case and, in the further alternative, that the facts and circumstances in this case give rise to an estoppel which prevents the union from relying on Article 18 in circumstances to which it would not have applied had the note in question been reproduced in the final collective agreement document. The union says that the Board has no jurisdiction to rectify a collective agreement and that the facts do not support the application of the doctrine of estoppel.

4. The first issue in the second category of issues is whether the equipment purchased by Hydro from 3-L can be described as "purchased from tenders with a closing date of November 20, 1982, or later", even if the critical note does influence, by one means or another, the interpretation or application of Article 18 of the parties' collective agreement. The remaining issues in the second category all require a detailed examination of the nature of the work being performed by 3-L under its contract with Hydro, in order to assess, for example, whether the subject matter of Hydro's contract with 3-L is properly described, as Hydro claims, as "packaged equipment" or "engineered assemblies" within the meaning of Article 18.3. In that connection, to complete the example, the union proposes to argue that determination of that issue is within the exclusive jurisdiction of the review panel provided for in Article 18.4, and that the failure of a majority of that panel to conclude that the subject matter of the 3-L contract was within the exceptions provided for in Article 18.3 is conclusive that it does not.

5. At the Board's hearing of July 17, 1984, the parties were in agreement that the Board should, if it could, adjudicate all of the issues in the first category and the first issue in the second category before hearing evidence and argument with respect to the balance of the issues in the second category. The parties then felt that their evidence and argument on these "preliminary issues", as the parties referred to them, could be severed from, and would be considerably less extensive than, evidence and argument in connection with the remaining issues, that the Board's determination of these "preliminary issues" might be dispositive and that, in any case, a determination of those issues would assist the parties in further attempts

to settle their dispute. The union took the position that the first issue in the first category - the identification of the document or documents constituting a collective agreement between the parties - could and should be disposed of before any of the other "preliminary issues" and that in the course of so doing the Board should place limits on the extent to which it was prepared to hear evidence of the course of negotiations leading to the execution of the collective agreement document(s). Hydro argued that the Board's initial hearings should deal with all of the preliminary issues together. Hydro also took the position that the Board's hearing should be adjourned in order to give notice of these proceedings to 3-L. Counsel for Hydro advised the Board that he had first thought of this point the previous evening and had not yet made any effort to notify 3-L himself, but proposed to do so at the earliest opportunity.

6. After hearing the submissions of counsel with respect to the issues involved in this arbitration and the manner in which the Board should proceed to hear and dispose of their differences over those issues, we ruled orally that the Board would not hear evidence and argument on the first preliminary issue separately from the others, nor would it rule in advance on the scope of the evidence which it would entertain with respect to any of those issues. This ruling made it necessary to adjourn the hearing of the arbitration, as neither party was prepared to proceed with the hearing together of all of the preliminary issues. Accordingly, it was unnecessary for the Board to rule whether it would adjourn its proceedings in order that 3-L could be given notice, or determine whether the Board should give 3-L notice, since counsel for Hydro had indicated that he would be giving 3-L notice of the Board's continuation dates. In consultation with the parties, a series of dates commencing November 19, 1984, were set aside for the hearing of the "preliminary issues".

7. As a result of Hydro's subsequent communication with 3-L, 3-L wrote to the Board requesting a hearing to determine whether it would be granted "status" in these proceedings. The requested hearing was scheduled for and conducted on October 22, 1984. In support of his application, counsel for 3-L sought to introduce evidence to establish that there was a contract with Hydro, that 3-L had been performing its obligations under that contract and that in the course of doing so it had designed and engineered custom products to suit Hydro's needs in a way which resulted in 3-L's having proprietary or industrial property rights in its designs. The Board asked the applicant and respondent to say whether those facts could be agreed upon. The applicant would agree only that there was a contract between 3-L and Hydro. Hydro agreed that there was a contract and that engineering was involved, but was not prepared to agree that 3-L retained any proprietary or industrial property rights in respect of the design of products delivered to Hydro pursuant to that contract. Counsel for 3-L explained that the existence of these alleged propriety or industrial property rights was important to his argument, and that 3-L's concern about those rights was that if the union succeeded in the arbitration, Hydro might cancel its contract with 3-L and misappropriate 3-L's design in order to complete or have another contractor complete the fabrication of the heavy water vapour recovery dryers which 3-L had contracted to supply. The Board then ascertained that neither the applicant nor the respondent opposed the Board's assessing 3-L's application for standing as an intervener on the assumption that it did have the propriety rights it claimed; this obviated any need for counsel to call the proposed evidence.

8. Counsel for 3-L argued that the Board should follow the approach the courts take when they determine whether a party can or should be added in a proceeding, and referred the Board to the following cases: *Union Natural Gas Co. v. Chatham Gas* (1917) 40 O.L.R. 148 (Ontario C.A.); *Amon v. Raphael Tuck & Sons* [1956] 1 Q.B. 357; *Starr and Township*

of *Puslinch et al* (1976) 12 O.R. (2d) 40 (Ont. Div. Ct.); *Looker v. Imperial Oil Limited* [1944] O.W.N. 167 (Ont. H.C.); *Moser v. Marsden*, [1892] 1 Ch. 487 (Eng C.A.); *Westgate v. Sudbury Rand Mines Ltd.* [1940] O.W.N. 258; and, *Re Schofield and Minister of Consumer and Commercial Relations*, (1980) 20 O.R. (2d) 764 (Ontario C.A.). All but the last mentioned decision dealt with the application of Rule 136 of the then Ontario Rules of Practice under the *Judicature Act*, R.S.O. 1980, c. 223, or its predecessors or the equivalent rule in England. The relevant portion of Rule 136 provided:

136(1) The court may, at any stage of the proceedings, order that the name of a plaintiff or defendant . . . that any person who ought to have been joined, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action, be added . . .

The *Schofield* case dealt with the application of Rule 504a of the then Ontario Rules of Practice, which provided:

504a. Any person interested in an appeal to the Court of Appeal between other parties may, by leave of the Court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario, intervene therein upon such terms and conditions and with such rights and privileges as the Court, the Chief Justice or the Associate Chief Justice may determine.

9. Counsel for 3-L relied particularly on the decision in *Union Natural Gas Co. v. Chatham Gas Co.*, *supra*, which he said was factually analogous to the circumstances of this case. The plaintiff in that case was a producer of natural gas. The defendant distributed the plaintiff's natural gas in the City of Chatham. The plaintiff and defendant were parties to a contract of some complexity which defined, *inter alia*, the plaintiff's obligation to supply natural gas to the defendant and the circumstances in which the defendant could and would distribute and sell that gas. The defendant had entered into a subsequent contract with the Dominion Sugar Company to supply it with natural gas it obtained from the plaintiff. The plaintiff took the position that the performance by the defendant of its obligations under the agreement with the Dominion Sugar Company violated the provisions of the plaintiff's agreement with the defendant. In proceedings to which the Dominion Sugar Company was not a party, the trial Judge granted an injunction restraining the defendant from supplying gas to the Dominion Sugar Company until further court order. In the decision cited by 3-L, the appeal court set aside the trial decision and directed a new trial in which Dominion Sugar Company was to be added as a party. Counsel submitted that, because Hydro might cancel its contract with 3-L if the applicant succeeds in this referral, 3-L's position is analogous to that of the Dominion Sugar Company in *Union Natural Gas Co. v. Chatham Gas Co.*, *supra*.

10. Counsel for 3-L argued that the test we ought to apply is as set out by Lord Denning, with respect to the English equivalent of Rule 136, in *Gurner v. Circuit et al.*, *supra*, at p. 595:

. . . It seems to me that when two parties are in dispute in an action of law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to "be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome.

This test was quoted with apparent approval in *Re Starr and Township of Puslinch et al.*, *supra*, where Mr. Justice Grange reviewed a number of authorities and made these observations (at page 46):

I can only conclude from these cases that there is no absolute rule that for a party to be added he must have a direct interest in the very issue to be determined. It is, I think, sufficient in the words of Lord Denning, *supra*, that the "determination of that dispute will directly affect a third person in his legal rights or in his pocket". I also believe that it is clear from the cases that even when the applicant satisfies that condition it is entirely discretionary in the Court whether he will be allowed to intervene or not, and the Court may always decline the application where it considers that the interest of the applicant is already adequately represented. I think we should adopt the caveat of Lief, J., *supra*, and lay down no fixed rule, but I do believe that in this instance, where the very enterprise of the applicants will be in danger of prohibition and where both applicants appear to have acted in reliance on the official plan that is now attacked, they should be permitted to intervene.

Counsel for 3-L argued that 3-L would be "directly affected" by a decision in the applicant's favour in this referral, and that the Board should therefore permit it to participate as a party in these hearings.

11. Counsel for 3-L acknowledged this Board's decisions in *Napev Construction Limited & Vepan Leaseholds Limited*, [1976] OLRB Rep. Mar. 109 ("Napev #1") and *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886 ("Napev #2"). In *Napev #1*, the union with bargaining rights for employees of Napev, "Local 2", applied pursuant to subsection 1(4) of the Act for a declaration that the respondents Napev and Vepan be treated as one employer for the purposes of the Act. It also made a concurrent referral to arbitration, under what is now section 124 of the Act, of a grievance alleging breach by Napev of a provision of its collective agreement with Local 2 which required that Napev let sub-contracts only to individuals or companies whose employees were members in good standing of unions affiliated with the Toronto Building Construction Trades Council. Napev was the general contractor on a construction project in Oakville. It had let a sub-contract to the respondent Vepan. Vepan had then entered into a further sub-contract with Prime Construction Limited for performance of masonry work. Prime was party to a collective agreement with "Local 1", a union which was not affiliated with the Toronto Building and Construction Trades Council. Prime and Local 1 were not given notice of Local 2's application under ss.1(4) and referral under s.124. On October 7, 1975, the Board determined that Napev and Vepan were related employers and declared that they would be treated as one employer for the purposes of the Act. The Board also declared that Napev and Vepan were bound by the collective agreement in question, and that any sub-contract of work by either Napev or Vepan to tradesmen or employers of tradesmen who were not members in good standing of unions affiliated with the council constituted a breach of the agreement. The Ontario Divisional Court later noted that:

... the effect of the Board's decision was to require Vepan to terminate the subcontract with Prime, which it did about October 10, 1975, and the employees who were members of Local 1 left the job site at Oakville. Vepan then entered into a new contract with a different sub-contractor for the masonry work. The masonry work at the job was substantially completed by April 22, 1976, and all work on the project, with the exception of certain minor deficiencies, was completed by February 25, 1977.

On November 7, 1975, Local 1 applied to the Board to be added as a party to the application and requested that the Board reconsider its decision of October 7, 1975. It confined its request for intervention to the proceedings under subsection 1(4) of the Act, conceding that it had no status to intervene in the arbitration proceedings referred to the Board under what is now section 124. In its decision of March 19, 1976, dismissing Local 1's reconsideration request, the Board said:

14. The parties of prime and direct interest in proceedings under section 1(4) are the companies said to be associated or related (in this case Napev Construction Limited and Vepan Leaseholds Limited), their respective employees, unions demonstrating representational rights for their employees, or unions who are bargaining agents for employees of the named corporations (in this case, the applicant). The parties directly affected by the decision of the Board under section 1(4) of the Act are therefore the applicants and the respondents in the original application. These are the parties of interest within the meaning of the Act.

15. Where attempts have been made to intervene in certification proceedings, the Board has consistently held that, in order to safeguard the rights of parties originating proceedings, and with a view to eliminating delay by parties claiming an interest, a would-be intervener must meet certain requirements. These requirements are deemed necessary in the field of industrial relations where time is indeed of the essence in order to avoid delay, multiplicity of proceedings and frustration of the purposes of the Act by parties who have no real representative status with respect to the employer and the employees involved. The Board has always required that an intervener must be either an employee in the bargaining unit to which the proceedings relate or a union holding representational authorization from one or more persons in the bargaining unit, or be the bargaining agent for employees in the bargaining unit. In the absence of these requirements, intervention has been denied.

16. In the present case, Prime Construction is not one of the related or associated companies named in the application under section 1(4), and this for obvious reasons. Furthermore, the persons whom Local 1 purports to represent are not employees of either Napev or Vepan but are in fact employees of the subcontractor, Prime. They are therefore not employees in the bargaining unit affected by the Board's decision under section 1(4). Local 1 therefore fails to meet the requirements for intervention referred to above. These requirements have application to the present circumstances.

17. There is a rule at common law which states that a person who would only be commercially and incidentally injured by a judgement is not entitled to be made a party to an action on the ground of such prospective injury. (See *Moser v. Marsden* (1892), 1 Ch. 487 at 490 (C.A.).) The plaintiff in that case was the patentee of a machine and brought an action against the defendant for using a machine which he alleged was an infringement of his patent. The foreign manufacturer of the machine applied to be added as a defendant alleging that a judgment in the action would injure him and that the defendant would not properly defend the action. The court held that the foreign manufacturer was not directly interested in the issues between the plaintiff and the defendant, but would only be indirectly or commercially affected and consequently had no right to intervene.

18. This case has been followed in Ontario in *Westgate v. Sudbury Rand Mines Ltd.*, (1940) O.W.N. 258 (Master Barlow) at 259:

The law is neatly stated in Holmsted, 5th ed., p. 656 as follows:

'A person who would be commercially and incidentally, but not legally and directly, injured by a judgment being obtained against the defendant in an action, is not entitled, on the ground of such prospective injury, to be made a party to the action.'

See *Moser v. Marsden*, (1892) 1 Ch. 487.

19. On consideration of the foregoing and the relevant evidence, the Board finds that Local 1 was at all material times lacking in status as a party having an interest within the meaning of the Act enabling it to notice of and participation in the 1(4) proceedings in this matter. Furthermore, the determination sought and made under section 1(4) clearly could not disturb the bargaining relationship between Local 1, its members, and Prime Construction. In any event, any injury that might have been anticipated at the commencement of the proceedings

or which may have occurred as the result of the decision of the Board could only arise commercially and incidentally but not legally and directly. In addition, the claims of Local 1 are too remote in time and in law to warrant its addition as a party to these proceedings.

Local 1 then sought judicial review of this decision, on the ground that the Board had committed a jurisdictional error in denying it status, either by failing to give effect to the provisions of the *Labour Relations Act* and regulations or by “failing to observe the principles of natural justice that required that anyone likely to be affected adversely by a decision of a tribunal should be given an opportunity to be heard.” The Divisional Court dismissed the application (in an unreported decision dated May 24, 1977), noting that:

In our view, the Board should be considered as master of its own practice and procedure and should be considered as having exclusive authority and jurisdiction to determine the rights or status of any person to intervene and to participate in any proceedings before the Board. We are satisfied that the Board did afford the parties a full hearing and there was no denial of natural justice in that respect. *We are satisfied not only that the Board acted within its jurisdiction, but that the conclusion of the Board that Local 1 had no status was based on sound principles.*

(emphasis added)

12. *Napev #2* involved the referral to the Board by Local 2 of a grievance that Napev had sub-contracted certain masonry work to Venice Masonry Contractors (Toronto) Limited (“Venice”), which employed members of Local 1, in violation of Local 2’s collective agreement with Napev. Local 2 requested both damages against Napev and an order directing Napev to either perform the work itself with members of Local 2 or sublet the work to another firm which employed members of Local 2. Local 1, Venice, and the contractors’ association to which Venice belonged all sought standing as interveners when the hearing of the merits of this grievance began. The Board dismissed those applications for standing, setting out its reasons in paragraph 5 of the decision:

5. None of the interveners is party to, or bound by, the collective agreement alleged to be binding upon Local 2 and Napev. Although they may be incidentally or commercially affected by a determination as to the merits of the grievance, that is not a sufficient basis to accord them status. See: *Napev Construction Limited and Vepan Leaseholds Limited*, [1976] OLRB Rep. March 109. Further, the fact that a jurisdictional dispute has been alleged by the interveners does not, in our view, open the way for them to participate in a hearing on the merits of the grievance in that they still remain strangers to the alleged collective agreement. Accordingly, we are satisfied that the interveners do not have status to participate in a hearing on the merits of the grievance.

An application by Local 1 for reconsideration of this decision was dismissed at [1980] OLRB Rep. Jan. 74.

13. Counsel for 3-L argues that the position of the proposed intervener in *Napev #1* is distinguishable from his client’s position because in *Napev #1* the Board’s decision reflects no suggestion and makes no finding that the Board’s proceedings would “directly affect” the proposed intervener’s legal rights or interfere with its contractual relations. He draws our attention also to the concluding words of the decision of the Divisional Court on judicial review, in which Mr. Justice Griffiths observed:

Finally, I might mention, we have some doubt in any event as to whether there

still remains any *lis* or dispute between the parties requiring adjudication. As I indicated earlier, the job at the Oakville site has long been completed, and it is very difficult for us to understand in what way Local 1 would now be affected and in what way Local 1 would now obtain any meaningful relief if this matter were sent back to the Board for a further determination.

Counsel draws from this the further distinction that the work in question here is still going on. With respect to *Napev #2*, counsel for 3-L submits that, on a review of the Board's decision, it appears that the proposed interveners failed to argue that their legal or contractual rights would be "directly affected" by the arbitration proceedings in which they sought to intervene.

14. Counsel for 3-L also sought to distinguish the decision of the Board in *Abitibi-Price Inc.*, now reported at [1984] OLRB Rep. Sept. 1155. In that case, the applicant trade union sought certification with respect to journeymen and apprentice plumbers and pipe fitters employed by the respondent in the ICI sector of the construction industry. The application raised a threshold issue whether the respondent operated a business in the construction industry so as to make it an employer within the meaning of section 117(c) of the *Labour Relations Act*. The Mechanical Contractors Association of Ontario sought to intervene on two grounds: first, that it was the employer bargaining agency which would be obliged to bargain on the respondent's behalf under the provisions of the *Labour Relations Act* if the application were successful and, second, that the threshold issue addressed the distinction between maintenance work and construction work, an issue which was important to the M.C.A.O. and its members. Counsel for 3-L drew our attention to paragraph 22 of that decision:

22. The Board finds nothing in the submissions of the parties to persuade it that the MCAO or its members will be legally and directly injured or prejudiced by the Board's determination of the threshold issue of whether the respondent operates a business in the construction industry. Nor does the Board find anything in the submissions of the parties to persuade it to exercise its discretion to determine its own practice and procedure to make the MCAO a party to the proceedings. In the result, the Board is satisfied that the issue of whether the respondent operates a business in the construction industry will be fully and fairly argued by the parties to this application.

Counsel for 3-L says that his client's interest can be distinguished from the interests of the M.C.A.O., and those of the proposed interveners in the other Board decisions, in that it has an existing ongoing legal relationship with Hydro which would be directly and adversely affected if the applicant were to succeed in this arbitration.

15. Counsel for Hydro advised the Board that he was instructed not to take a position on the legal issues raised by 3-L's application and that his client took no objection to the participation of 3-L in all respects in this hearing, should the Board see fit to grant it standing. He noted that as counsel for Hydro he was not in a position in this arbitration to represent the views or wishes of 3-L. He suggested that the Board should weigh the benefit of having a party in 3-L's position participate in an arbitration of this sort when the contractual arrangements in question are complex.

16. Counsel for the applicant advised the Board that his client was not requesting any remedy which would "directly" affect the contractual relations between Ontario Hydro and 3-L. He emphasized that the applicant was not seeking any form of injunctive relief. He said the applicant was asking only for a declaration that the collective agreement had been violated and an award of damages, and not for a cease and desist direction. If the applicant were

successful in this arbitration, he submitted, the consequences for 3-L and its relations with Hydro would be determined by Hydro, and not by this Board.

17. Counsel for the applicant questioned the Board's jurisdiction to permit intervention. He argued that section 124 of the Act defines exhaustively the persons who may participate in the hearing of an arbitration referred to the Board under that section. In any event, he submitted, 3-L's position was indistinguishable from the position of Venice in *Napev #2*, and it was no more entitled to standing than Venice had been. He noted that the court cases referred to by counsel for 3-L focus closely on the nature of the relief sought in the proceedings before the court, and that the courts tended to add parties directly affected by injunctive relief which, he noted, was not sought in this case. Counsel argued that the issue of 3-L's assumed proprietary rights in the design of the items being delivered to Hydro was a "red herring." He argued that if Hydro's response to success by the applicant in this arbitration was to cancel the contract with 3-L and retender the balance of the work, it could require contractors to do their own design work.

18. Counsel for the applicant acknowledged that employees in the bargaining unit covered by a collective agreement may, in some circumstances, be entitled to participate in arbitration proceedings concerning that agreement and to receive notice of them as if they were parties: *Re Hoogendoorn and Greening Metal Products Screening Equipment Co. et al.*, (1968), 65 D.L.R. (2d) 641, [1968] S.C.R. 30 (S.C.C.) and *Re Bradley et al. and Ottawa Professional Firefighters Association et al.*, [1967] 2 O.R. 311, 63 D.L.R. (2d) 376 (Ont. C.A.). They have that right, in certain circumstances, because they are bound by the terms of the collective agreement as a matter of law. Conversely, those who, like 3-L, are not bound by the collective agreement do not have the right to participate in or have notice of hearing of an arbitration under that collective agreement: *Westroc Industries Ltd.*, (1974) L.A.C. (2d) 61 (Beatty) at pp. 73-74.

19. This Board is not a court with an inherent jurisdiction to deal with any legal dispute which may exist between the parties who appear before it. The Board derives its jurisdiction from the *Labour Relations Act*, which provides in subsection 102(13) that:

(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

Section 79 of the Board's Rules of Procedure, R.R.O. 1980, Reg. 546, provides:

79. The Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

Although on a referral under section 124 the Board acts as "an arbitrator to which ... the *Labour Relations Act* applies" within the meaning of section 3(2)(d) of the *Statutory Powers Procedure Act*, R.S.O. 1980 c.484, the Board's jurisdiction and procedure are still determined by those provisions of the *Labour Relations Act* and Rules of Procedure which govern the Board's proceedings generally: *Re International Association of Heat & Frost Insulators & Asbestos Workers Local 95 and Master Insulators Association of Ontario et al.* (1979), 25 O.R. (2d) 8 (Ont. Div. Ct.), and *Ontario Erectors Association et al. v. International Union of Operating Engineers, Local 793*, (1980) 2 A.C.W.S. (2d) 307 (Ont. Div. Ct.)

20. Section 79 of the Board's Rules of Procedure impose no express limit on the circumstances in which the jurisdiction to add a party may be exercised, leaving it entirely in the discretion of the Board. This section of the Rules would be inapplicable to arbitration referrals only if it were inconsistent with the language of section 124 of the Act. There is no inconsistency. Section 124 requires that an applicant be a party to the collective agreement, but it is silent as to who may be a party respondent or intervener. As the Board observed in *Ontario Hydro*, [1978] OLRB Rep. Mar. 304 at paragraph 7:

7. It is well settled that a person whose interests may be directly and adversely affected by an adjudication in respect of a collective agreement is a proper party to those proceedings notwithstanding that he may not, strictly speaking, be one of the two parties to the collective agreement. In that circumstance a board of arbitration has a duty to give notice of its proceedings to the person or company in question and to afford them a full opportunity to participate. (*Re Bradley and Ottawa Professional Fire Fighters Ass'n*, (1967) 63 DLR (2d) 376 (Ont. C.A.), *Re Hoogendoorn and Greening Metal Products and Screening equipment Co.*, (1968) 65 DLR (2d) 641 (S.C.C.)) Thus the parties to a collective agreement and the parties to proceedings relating to that agreement need not always be one and the same. And that is so no less under section 112a [now s. 124] of The Labour Relations Act than in other arbitration proceedings.

In that case the Board held that Ontario Hydro was a proper party to a referral to arbitration of a grievance that Hydro had violated the provisions of a collective agreement between the Ontario Allied Construction Trades Council and EPSCA. The *Hoogendoorn* and *Bradley* cases illustrate that persons other than parties signatory to a collective agreement will have the right to participate in an arbitration thereunder if they are *bound* by the agreement and their own rights thereunder are *directly* in question and may be determined in the arbitration. There is no discretion in such cases to permit or deny standing as an intervener when it is sought by such persons - they are entitled to participate as of right. Since it involves the exercise of a discretion, the Board's power under section 79 of its Rules of Procedure obviously extends to persons other than those entitled to participate as of right. As we understood its submission, 3-L did not claim it had a right to standing but, rather, that we had a broad discretion to grant it standing - a discretion which we should exercise in their favour in the circumstances of this case.

21. While it was well understood by all involved, it is worth noting here that the undoubted right of either the applicant or the respondent to involve 3-L in these proceedings as a source of evidence relevant to the issues either of them raised before the Board was not in question here. The question raised by 3-L's motion was whether 3-L had or would be given the same right to participate as a party. Having regard to the analysis in *Napev #1* of which the Divisional Court approved and the similar analysis in the other Board decisions referred to earlier, we were and are satisfied that 3-L was not entitled to standing as of right. We were and are also satisfied that we did have a discretion to grant 3-L standing if we considered it appropriate to do so.

22. In deciding how to exercise its discretion to permit intervention by a person not entitled to intervene as of right, the Board must be sensitive to the nature and limits of the jurisdiction it exercises in the particular proceedings before it and, for that reason, cautious about drawing analogies with the courts' experience in exercising a facially similar discretion. One of the factors weighed by the courts in many of the cases cited by counsel for 3-L was that the effect on the proposed intervener of the result sought by one of the parties before the

court might become the subject of subsequent legal proceedings in the same court involving the proposed intervenor and one or more of the original parties; thus, by adding the proposed intervenor the court could bind it to the result and so avoid a multiplicity of proceedings. The Board's permitting intervention in its proceedings could only avoid a multiplicity of proceedings if the potential proceedings involve matters within the Board's jurisdiction. As the Board's jurisdiction is considerably narrower than that of the courts, there will be a narrower range of cases in which avoidance of a multiplicity of proceedings can weigh in favour of granting intervenor status. This is clearly not one of those cases, as 3-L took the position that this Board would have no jurisdiction to resolve any of the legal issues which would or might arise between it and Hydro should this referral be decided in the applicant's favour.

23. Apart altogether from the fact that we could not adjudicate the rights *inter se* of the respondent and proposed intervenor if the latter were permitted to participate as a party in this proceeding, there are other important distinctions between the facts of this case and those in *Union Natural Gas Co. v. Chatham Gas*, *supra*. There, the trial judgement enjoined the defendant from fulfilling its obligations under its contract with the sugar company which the appeal court ruled ought to be a party to the action. As the appeal court observed about the trial decision:

This adjudication virtually annuls the sugar company's agreement, or at all events deprives that company of any right to specific performance, and places it under such a disability that it cannot make an agreement with the defendants except by the permission of the Court....

Hydro's primary obligation to 3-L is not to supply goods, but to pay money. No decision the Board would or could make in this referral would enjoin Hydro from paying money to 3-L. It is hard to see how any such decision would deprive 3-L of a right (if it would otherwise have one) to specific performance or to any other remedy for breach by Hydro of its agreement with 3-L. In the *Union Natural Gas* case, the appeal court noted that the agreement between the defendant and the sugar company was not merely an agreement for the supply of natural gas generally but for the supply of the particular gas obtained by the defendant from the plaintiff pursuant to the terms of the agreement between the latter two parties. The terms of that agreement were recited in the defendant's contract with the sugar company, the defendant's obligation to supply gas under the latter contract was conditional on its being able to obtain it from the plaintiff pursuant to the terms of its agreement with the plaintiff and the sugar company's contract with the defendant gave it the right to act in the defendant's name to compel supply under the agreement between the defendant and the plaintiff. The appeal court observed that:

... these provisions distinguish this case from others in which it might be said that a contract for the supply of a commercial article between two parties may be attacked in litigation between them without bringing in a sub-purchaser or a person to whom the purchaser is to hand over the article bargained for under the contract. In that case the remedy would be in damages, and the sub-purchaser would be expected to go into the market and supply himself. Here, however, while such a course might be open and might be taken by the sugar company - see *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105 - the other rights given by the contract would entitle the sugar company to a larger remedy than mere damages. Besides this, if the learned trial Judge's view of the relations of the plaintiffs and defendants, as that of partners, is sustainable, then there is all the more reason why the outsider should be heard in his own interest, and not left in the lurch in the settlement of the partnership difference.

...

3-L's contract with Hydro is not intertwined in these ways with the collective agreement before us here. 3-L did not argue that its contractual or proprietary rights under or arising out of

the performance of its contract with Hydro were in any way contingent on the scope of Hydro's collective agreement obligations. It may be that Hydro might cancel its contract with 3-L if this referral were decided in the applicant's favour, but that possibility exists independent of these proceedings, and it was not suggested that Hydro's obligations to 3-L upon cancellation would be altered by a Board decision in the applicant's favour.

24. Proceedings before this Board under section 124 were intended by the Legislature to be an analogue of the private arbitration process which section 44 of the Act requires be provided for in each collective agreement as the final mechanism for resolving disputes over its interpretation, application, administration or alleged violation. This arbitration process is intended to be private and expeditious. The concern for expedition is particularly reflected in the prompt hearing requirements of section 124. The need for expedition will ordinarily militate against permitting intervention by a third party not entitled to participate as of right. Common sense suggests, and experience confirms, that the time consumed in hearing a matter will increase if the number of participants increases, because the mechanics of conducting and even scheduling the hearing become more complex. The essential nature of grievance arbitration as a private system for dispute resolution also militates against permitting intervention by a third party not entitled to participate as of right.

25. *Craigmont Mines Limited*, [1979] 1 Can. LRBR 222, involved an application under section 108 of the British Columbia Labour Code, which affords "a party affected by the decision or award of an arbitration board" the right to apply to the B.C. Labour Relations Board for review of the award. Employees of Craigmont represented by the United Steelworkers of America (the "Steelworkers") had refused to cross a picket line established at Craigmont's premises by another union, the Canadian Association of Industrial Mechanical and Allied Workers ("CAIMAW"). An arbitration proceeding involving Craigmont and the Steelworkers resulted in an award declaring that the employees' refusal to cross CAIMAW's picket line constituted a violation of the "no-strike" clause of the collective agreement between Craigmont and the Steelworkers. CAIMAW, which had not been a party to those arbitration proceedings, claimed to be a "party affected" by the award and applied to the BCLRB for review under section 108 of the B.C. Labour Code. In that context, the B.C. Board observed (at pages 225 and 226):

... The broad philosophical assumption which underlies the grievance arbitration system established in that Part of the Code - an assumption which really underlies the whole of collective bargaining - is that the relationship between an employer and a trade-union should be one of self determination, subject only to those kinds of external controls or influences as may be absolutely essential to the general public interest. Employers and trade-unions are encouraged to create their own *private* law in the form of collective agreements. They are free as well to fashion their own *private* systems for the resolution of grievances. The bargaining table understandings they reach may create immediate or potential problems for others: e.g. restrictions on contracting-out, non-affiliation clauses, and the like. Similarly, arbitration boards selected by the parties to interpret and apply those provisions may produce awards which have a major impact on outsiders to the relationship. Nevertheless, it could not be seriously argued that those outsiders have any right to participate in the initial bargaining, or that they have the legal right to either initiate or intervene in the subsequent arbitration proceedings. It would come as something of a surprise, then, to discover that the legislature had opened the door to those "affected outsiders" at a final, review stage - i.e. so that they could seek to have set aside an award with which the parties, for whatever reasons, are apparently content.

... One can imagine a variety of cases where "affected outsiders" would welcome the opportunity to make an application under Section 108(1). Two examples were given earlier;

contractors affected by interpretations of contracting out provisions, or third parties affected by interpretations of non-affiliation clauses. Surely the legislature did not intend that those outsiders should be entitled to insinuate themselves into the private law of the parties through the vehicle of section 108(1).

The legal issue with which the B.C. Board dealt in *Craigmont* is different from the issue here. There the question was whether someone not bound by the collective agreement under which an arbitration board is constituted may be a "party affected" so as to have the right to initiate review of the board's award. Here the question is whether a discretion to permit intervention in arbitration proceedings ought to be exercised in favour of someone not bound by the collective agreement with which the arbitration proceedings are concerned. Despite those differences, however, the labour relations considerations which the B.C. Board took into account in dealing with the question before it are appropriate considerations in dealing with the issue before us. While some arbitrators have found that the existence of a jurisdiction to permit intervention is not *per se* inconsistent with the nature of rights arbitration under a collective agreement (see, for example, *Re British Columbia Institute of Technology and College of New Caledonia* (1979), 24 LAC (2d) 129 (Hope)), the exercise of such a jurisdiction seems to have been confined to circumstances in which the proposed intervener is an employee or trade union interested in an issue which might affect the intervener in other labour arbitration proceedings with the same employer party: *Somerville Industries Ltd.*, (1969) 20 L.A.C. 404 (Palmer) and *Re Canadian Union of Public Employees*, (1982) 4 L.A.C. (3d) 385 (Swinton); and see *Re Omega Marble Co. Ltd.*, (1971) 22 L.A.C. 222 (Johnston).

26. Having regard to the nature of the grievance arbitration process, when sitting as an arbitration board under section 124 of the *Labour Relations Act* this Board should not permit intervention by persons who are not entitled to standing as of right except when the special circumstances of the proposed intervener make it desirable from a labour relations perspective to permit such intervention. No such circumstances were demonstrated here. Accordingly, by telegram dated November 14, 1984, the parties and 3-L were advised that, for reasons to be delivered at a later date, the application of 3-L Filters Limited for standing as an intervener in the hearing of this arbitration referral was dismissed. These are the reasons then promised.

3472-84-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada, Local 463, Complainant, v. Labourers' International Union of North America, Local 597 and **Steen Contractors Limited**, Respondents, v. Milne & Nicholls/Vanbots Joint Venture, Intervener

Jurisdictional Dispute - Practice and Procedure - Board issuing interim order on agreement - Complainant union seeking to withdraw complaint after project in question completed - Board denying consent to withdraw - Proceeding continued for adjudication of merits

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *R. Wilson*.

APPEARANCES: *Laurence C. Arnold* and *C. Burrows* for the complainant; *S.B.D. Wahl* and *Wm. Fairservice* for the respondent Labourers' International Union of North America, Local 597 and for Labourers' International Union of North America, Ontario Provincial District Council; no one appearing for the respondent Steen Contractors Limited; *S. C. Bernardo* and *Jim Thompson* for the intervener; *S. C. Bernardo* and *Jim Thompson* for Labourers Employer Bargaining Agency.

DECISION OF THE BOARD; May 15, 1986

1. This is a complaint made under section 91 of the *Labour Relations Act* concerning a work assignment in which the complainant, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada, Local 463, ("Plumbers' Local 463") requested the Board to issue an interim order under subsection 8 and a cease and desist order under subsection 9 of section 91. The complaint came before the Board, differently constituted, for consultation with the parties respecting those requests. The parties agreed at the consultation that the Board should issue an interim order. The Board's interim order is set out at paragraph 3 of the Board's decision which issued following the consultation. The Board found it unnecessary to issue a cease and desist direction. Paragraph 3 states as follows:

In accordance with section 62 of the Board's Rules of Procedure, the Registrar listed this matter for a consultation with the parties. At this consultation, the Board heard the representations of the various interested parties with respect to the request for an interim order. The most significant of those representations was that the parties named in the style of cause had agreed to an interim order in the following terms:

the "work in dispute" as described in paragraph 4 of the complaint shall be assigned to a composite crew one half of which shall be persons represented by the appropriate local union(s) of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the other half of which shall be persons represented by the appropriate local unions of the Labourers International Union of North America.

Having regard to the parties' representations and agreement, we so order. In view of the parties' agreement on the terms of this order and their undertaking to comply therewith, it is not necessary to proceed with the application for a cease and desist direction at this time.

2. The work in dispute referred to in the Board's interim order was described in the complaint as follows:

The handling and installation of storm sewer pipe and catchbasins between the building and property lines at the General Motors Stamping Plant Project - Oshawa (not including excavation and backfilling).

3. The Board's decision making the interim order also directed the Registrar to list the complaint for a pre-hearing conference, a procedure which the Board has adopted for complaints under section 91 of the Act for the purpose of identifying factual and legal issues as well as matters not in dispute, so as to reduce the hearing time required for the complaint. The work was completed before a pre-hearing conference was convened and Plumbers' Local 463 requested leave of the Board to withdraw its complaint. Its request was strongly opposed by the respondent Labourers' International Union of North America, Local 597 ('Labourers' Local 597') and the intervener Milne & Nicholls/Vanbots Joint Venture, general contractor on the project. Consequently, the matter was scheduled for hearing before the Board as constituted herein. The Board heard the parties' submissions respecting whether it should consent to the complaint being withdrawn and, if so, on what terms. This decision deals with that issue.

4. Section 91(12) of the Act explicitly requires the Board's consent for a complaint made under section 91 to be withdrawn and it gives the Board the power to fix the terms and conditions for withdrawal. Where the Board has issued an interim order and a cease and desist direction and the complainant subsequently requests leave of the Board to withdraw the complaint, it has been the Board's practice to revoke the interim order and cease and desist direction as a condition to its consent that the complaint be withdrawn. In this respect see the Board's decisions in *Campeau Corporation*, [1975] OLRB Rep. Sept. 690; *Redfern Construction Company Limited*, [1968] OLRB Rep. Jan. 1050; *Franki Canada Limited*, [1967] OLRB Rep. Oct. 671; *Fraser-Brace Engineering Company Limited*, [1967] OLRB Rep. Sept. 605; and *Crump Mechanical Contracting Limited*, [1967] OLRB Rep. July 408. Plumbers' Local 463 would be content to have the Board make revocation of the interim order a condition for withdrawal of its complaint. Labourers' Local 597 and the intervener take the position that there are significant, different circumstances at play in the instant complaint that should cause the Board to withhold its consent and dispose of the complaint on its merits.

5. What makes this case different from the Board's earlier cases, according to Labourers' Local 597 and the intervener, is that the work in dispute has been the subject matter of earlier proceedings before the Board involving the same three parties; that is, Plumbers' Local 463, Labourers' Local 597 and the intervener. Counsel for Local 597 and the intervener were referring to the events set out in the Board's decision in *Harold R. Stark Company Limited*, [1982] OLRB Rep. Feb. 222. The events which relate to their submissions herein are set out below.

6. The intervener was general contractor on a project for General Motors at its plant in Oshawa in 1981. It sublet a wide range of work on the project to another contractor, Harold R. Stark Company Limited. A portion of the work involved the installation of catchbasins and storm sewers, the same kind of work which is the subject matter of the instant complaint. Local 463 filed a grievance with Stark alleging that it had violated the subcontracting provisions of the plumbers' provincial agreement because Stark had subcontracted the portion of its contract respecting the catchbasins and storm sewers to another contractor not in a collective bargaining relationship with Local 463. That contractor was in a collective bargaining relationship with Labourers' Local 597 and assigned the work to its members employed by

the contractor. That grievance was referred to the Board for final and binding arbitration pursuant to section 124 of the Act. Prior to the filing of the grievance and its referral to the Board, the business agent for Plumbers' Local 463 sought to have Stark take back the work from the contractor and perform the work with its own forces, with the expectation that Stark would use members of Local 463. Stark did not take back the work and the complainant made no request of the other contractor to employ its members. Nor did it try to have Stark request the contractor to employ its members on the work.

7. Stark filed a complaint under section 91 of the Act as a defence to the grievance alleging that there was a dispute over the assignment of the work between Local 463 and Labourers' Local 597. The grievance referral was adjourned in order to allow the work assignment complaint to be dealt with first. Plumbers' Local 463 took the position at the hearing into the complaint that the Board did not have jurisdiction under section 91(1) of the Act to inquire into the complaint because no demand for the work in dispute had been made of the employer who had assigned the work to Labourers' Local 597 members. Therefore, although Plumbers' Local 463 acknowledged that there were "jurisdictional overtones" to the dispute between it and Stark, it was contending that the scope of section 91(1) was not sufficient to encompass the particular factual basis of the dispute. Stark and Labourers' Local 597 contended that Local 463's request of the work from Stark was for all practical purposes a request for Stark's subcontractor to assign the work to Local 463's members. Further, since it was Stark's choice of a subcontractor which determined which members of which union would perform the work, the Board should take the realistic approach and treat Stark as the employer for purposes of section 91(1).

8. The Board acknowledged that the control exercised by a contractor like Stark over a subcontractor, and the influence that control has on work allocation in construction, supports a valid argument as to why the Board should have the jurisdiction to deal with disputes about work allocation in the context of subcontracting provisions in collective agreements and their enforcement. But, after having reviewed the history of section 91(1) and the interpretation given to it by the Board, it concluded that, in the section's present form, the wording did not cover the fact situation underlying the dispute between Plumbers' Local 463, Stark and Labourers' Local 597. Before the Board dismissed the complaint, however, it expressed at paragraph 16, in the following terms, its concerns about the particular lack of jurisdiction:

16. In their submissions, the parties, other than U.A. Local 463, clearly indicated their concern that if this matter could not be dealt with under section 91, then it would be dealt with in a section 124 arbitration proceeding where the root jurisdictional issues would not likely be fully addressed. This is an understandable concern. However, such a concern cannot be a basis for giving section 91(1) a meaning not contemplated by the statute. It may be that the concerns expressed about having what is essentially a jurisdictional matter dealt with at arbitration can in fact be dealt with in the context of the Board fashioning a remedy in the section 124 arbitration proceeding, assuming, of course, that a violation of the subcontracting provision in the applicable collective agreement is made out. Can it be said, for example, that a construction trade union has properly sought to mitigate the damages in circumstances where it is alleging a violation of a subcontracting provision, but at the same time has refrained from seeking an assignment of the work from the employer actually responsible for assigning it. Similarly, it may be open to question as to whether in a section 124 proceeding any order should go requiring an employer to cease subletting certain work to a firm employing members of one union, and requiring him to do it himself or have it done by another contractor using members of the grieving union, in circumstances where although the matter arises out of a jurisdictional dispute the grieving union has not brought the matter within the provisions of section 91 so as to allow the jurisdictional issues to be properly

canvassed and ruled upon. This is particularly so in light of the fact that the subcontractor and the union whose members are actually performing the work will likely not have standing to participate in the section 124 arbitration proceedings. We raise these issues only as matters which perhaps should be addressed at a later time, and reach no conclusions with respect to them.

9. The parties in the instant case made fully-reasoned submissions in support of their respective positions with regard to the complainant's request to withdraw the complaint. Their positions may be summarized as follows.

10. Plumbers' Local 463 argues that subsections 1 and 8 of section 91 have fulfilled their purpose and that the interim order made under subsection 8 is spent. Thus, there is no need to determine the work assignment dispute on its merits as it would serve no useful purpose now that the work in dispute has been completed. Counsel for Local 463 contends that the Board has not found opposition to a request by a section 91 complainant to withdraw its complaint to be cause for denying the request. The Board has simply revoked its interim order and cease and desist direction before consenting to withdrawal of the complaint. That, counsel contends, is how the Board responded in its decision in *Sheaffer-Townsend Limited*, Board File No. 7265-74-JD, an unreported decision which issued April 24, 1975, when Plumbers' Local 46 opposed the request of the complainant Sheaffer-Townsend to withdraw its complaint. Local 46 requested the Board, in the event it consented to the complaint being withdrawn, to make the interim order (which had preserved the employer's assignment of the work to Local 46) into a direction. That request was opposed, in turn, by the other respondent trade union. Before revoking its interim order and consenting to withdrawal of the complaint, the Board stated that:

... to grant the complainant's request for leave to withdraw would preclude any determination by the Board on the merits of the complaint and without which the Board is not prepared to treat the Interim Order as a direction. In these circumstances, the Board is of the opinion that its consent to the complainant's request should necessarily be conditional upon a revocation by the Board of its Interim Order in this matter.

Plumbers' Local 463 would be content with the same response to its request, counsel asserts.

11. Labourers' Local 597 and the intervener take the position that the interim order issued under section 91(8) of the Act is only a step in the process towards the work assignment dispute being determined on its merits, the purpose of the order being to stabilize the work place while the main dispute is being resolved. When section 91(8) is invoked, they argue, all parties to the dispute expect and are entitled to a determination on the merits. They submit that this particularly holds true for the instant complaint because Plumbers' Local 463 raised the same dispute in 1981 in the context of a subcontracting grievance filed against a subcontractor of the intervener herein. Then, on technical grounds, Local 463 vigorously and successfully prevented the conflicting work jurisdiction claims of Plumbers' Local 463 and Labourers' Local 597 to the same work as is in dispute here being resolved in the proper context of a jurisdictional complaint. The fact that the work in each incident was the same, was being done for the same client on the same property, had been let by the same general contractor, the intervener herein, and involves the same two trade unions, is evidence that the competing claims of the two unions for the work in question will continue to be a source of conflict, including potential unlawful strikes, in the Oshawa area. In the circumstances, Labourers' Local 597 and the intervener contend that they are entitled to have the issue resolved once and for all.

12. Section 91 is unique in several respects amongst the various charging sections of the Act, but particularly in respect of subsection 12 of section 91 which explicitly provides for the Board to fix the terms and conditions under which a complaint made under section 91 may be withdrawn. The uniqueness of section 91 can be seen in the various subsections of section 91 which are relevant to the specific issue before the Board respecting whether Plumbers' Local 463 should be allowed to withdraw its complaint and, if so, on what terms and conditions. These subsections are set out hereunder:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

(2) The Board may in any direction made under subsection (1) provide that it shall be binding on the parties for other jobs then in existence or undertaken in the future in such geographic area as the Board considers advisable.

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(8) Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers' organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.

(9) The Board may in an interim order or direction or at any time after the making of such interim order or direction direct any person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents to cease and desist from doing anything intended or likely to interfere with the terms of an interim order or direction respecting the assignment of work.

(10) The Board shall file in the office of the Registrar of the Supreme Court a copy of an interim order or direction made under this section, exclusive of the reasons therefor, in the prescribed form, whereupon the interim order or direction shall be entered in the same way as a judgment or order of that court.

(11) After an interim order or a direction has been entered, it is enforceable by a person, employee, employer, employers' organization, trade union or council of trade unions affected as a judgment or order of the Supreme Court on the day next after the day fixed for compliance in the interim order or direction.

(12) A complaint made under this section may be withdrawn by the complainant only upon such terms and conditions as the Board may fix.

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(17) Where the Board has made an interim order or a direction under this section, the person, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents affected by the interim order or the direction may comply with it notwithstanding any provision of this Act or of any collective agreement relating to the

assignment of the work to which the interim order or the direction relates, and the person, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents so complying shall be deemed not to have violated any provision of this Act or of any collective agreement.

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(19) Before disposing of an application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

13. Section 91 of the Act gives the Board broad discretion to deal with work assignment disputes, both as to the scope of its inquiry (subsection 19) and its remedial powers (subsections 1, 2, 8 and 9). Such authority equips the Board well to bring together all of the parties, unions and contractors alike, who are affected by the dispute for purposes of resolving it. Subsection 17 of section 91 gives primacy to the Board's directions made under subsection 1, its interim orders made under subsection 8 and cease and desist directions made under subsection 9, over other provisions of the Act or any collective agreements to the extent that a party complying with a direction or order is deemed not to have violated any provision of the Act or any collective agreement by so doing. All of this speaks to the purpose of section 91 which is to provide a scheme for resolving the competing claims of trade unions for work which removes such disputes as a cause of illegal work stoppages, allows the parties the opportunity to protect their interests and the Board the power to develop an appropriate labour relations remedy. In this respect, see the Board's decision in *Pre-Con Company, A Division of St. Mary's Cement Ltd.*, [1981] OLRB Rep. July 947. While it is readily apparent from subsections 8 through 11 of section 91 that interim orders under subsection 8 and cease and desist directions under subsection 9 are extraordinary measures, they are only interim remedies. The ultimate remedy is to determine the merits of the competing claims and make the appropriate award of the work in issue. The importance of that remedy is underscored by subsection 2 which gives the Board discretion to make its award binding on the parties well beyond the job on which the dispute arose. Even where the Board does not make use of subsection 2, its awards made under subsection 1 in the construction industry have strong precedential effect. The particular purpose of subsections 8 and 9 in the overall scheme of the section is to maintain stability on the job site while the work assignment dispute is being resolved.

14. Plumbers' Local 463 has requested leave of the Board to withdraw its complaint. The word complaint has dual meanings in the context of a section 91 proceeding, particularly where, as here, the complainant is a trade union. The first and narrower one is the assertion of a claim to the work in dispute. That assertion in turn gives rise to notice of the claim being served on other parties who might be affected by the claim. Those parties would include any other trade union, like Labourers' Local 597, which may have a competing claim to the work. So the second, broader meaning of "complaint" includes any competing claim spawned by the initial assertion. In fact, as the Board's *Stark* decision, *supra*, so carefully points out, there must be at least two competing claims against the employer for the work in order for the Board to have jurisdiction under subsection 1 of section 91. Thus, even when the complainant is not a trade union, whenever a complaint is properly made under section 91(1), there are at least two competing claims to the work in dispute. Therefore, while the proceedings begun by Local 463's initial filing may be called "the complaint", the proceedings now involve more than the initiating claim. The situation is analogous to a civil proceeding where there is a claim and counter-claim, or to a mechanic's lien action in which there are a series of claims within a single action.

15. Where as here, a trade union is the complainant under section 91 of the Act, the Board is authorized not only to decide whether the complainant is entitled to the work in dispute, but if not the complainant, who is entitled to it. The object of the section clearly is to deal with all competing claims to the work. Having regard to that object and the overall purpose of section 91, it seems unlikely that the Legislature has given the right to a party which begins a claim the right to terminate the claim in a manner which would terminate the competing claims of the other parties to the proceedings commenced by the initial claim.

16. In the instant case, therefore, while it may not make sense to compel Plumbers' Local 463 to pursue its initial claim in spite of its request to withdraw it, there are good labour relations reasons for not allowing Local 463 to bring to an end the proceedings with respect to Labourers' Local 597's counter-claim to the work. First, the work in dispute herein has been and remains a source of conflict between the two trade unions in the Oshawa area, conflict which has demonstrated a potential for causing unlawful strikes. Therefore, it makes labour relations sense that the Board proceed to determine the merits of the dispute, as Labourers' Local 597 and the intervener have argued. Second, in view of the Board's comments at paragraph 16 of its decision in the *Stark* case, *supra*, about the problems of dealing under section 124 of the Act with what is essentially a work assignment dispute, it also makes labour relations sense that the determination be made in the context of a section 91 complaint rather than leaving it to arise again as a referral of a grievance under section 124. Given the purpose of section 91 and the fact that Plumbers' Local 463 initially came before the Board with a request for an inquiry into its claim concerning a work assignment dispute and with a request for an interim order, which it obtained, the Board is of the view that this is a case where the complainant should not be permitted to unilaterally cause the proceedings to be terminated. To allow Local 463 to do so would mean that the conflict which gave rise to the complaint would remain unresolved. The Board is not prepared to have that happen. Moreover, Local 463 has enjoyed the benefit and protection of the Board's interim order and, having set in motion a request for a final order or direction respecting the work in dispute, it should not be permitted to deprive Labourers' Local 597 and the intervener of the opportunity to have their interests in a potentially disruptive dispute protected by means of an adjudication of the matter on its merits.

17. Therefore, pursuant to its discretion under subsections 1, 12 and 19 of section 91, the Board will not consent to the complaint being withdrawn. Accordingly, these proceedings will continue. However, the fact that the Board is proceeding does not require Local 463 to attend; it can withdraw from the proceedings if it chooses to do so and, in its absence, leave the matter to be decided by the Board on the evidence and submissions of the other parties.

18. Accordingly, the Registrar is directed to schedule this complaint for a pre-hearing conference pursuant to the Board's Practice Note #15. The Ontario General Contractors Association is to be served with notice of the pre-hearing conference and may participate in it without prejudice to the right of any of the parties to challenge the Association's right to participate in the hearing into the merits of the complaint. In this respect, the parties are directed to set out their respective positions to the pre-hearing conference vice-chairman on the Association's status to participate in the hearing into the merits of the complaint. In the proceedings, it will be at risk of having the Board determine the dispute on the uncontested evidence of the other parties.

0666-85-U Norman F. Stroesser, Complainant, v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America U.A.W., Local 444 and Chrysler Canada Limited, Respondent

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Filing of complaint delayed because of incorrect advice of lawyers - Complaint not entertained

BEFORE: *Robert J. Herman*, Vice-Chairman.

APPEARANCES: *Patrick Ducharme* on November 26 and 27, 1985, *Paul Nesseth* on March 25 and 26, 1986, for the complainant; *L. A. MacLean*, *Jim O'Neil* and *Gerry Bastien* et al, for U.A.W. Local 444; *Leonard P. Kavanaugh* and *David Deluzio* for Chrysler Canada Ltd.

DECISION OF THE BOARD; May 30, 1986

1. This is a complaint filed on June 17, 1985 pursuant to section 89 of the *Labour Relations Act*, alleging that the respondent union and employer violated section 68 of the Act on or about September 10, 1981 in that the respondents neglected to advise the complainant that his grievance had been withdrawn.
2. The complainant, Norman Stroesser, had been a long time employee of the respondent company, and as such had been a member of the bargaining unit represented by the respondent union. On or about September 18, 1979 the complainant was discharged, and the respondent union forthwith filed a grievance on his behalf, alleging that the discharge was improper. That grievance was withdrawn in early September of 1981, and the complainant alleges that the respondent union violated the provisions of section 68 of the Act when they neglected to inform the complainant that his grievance had been so withdrawn.
3. This complaint was not filed until June 17, 1985 and both respondents submit that the Board ought not to entertain the present complaint, in light of the extreme delay between the events giving rise to this complaint and the filing of the complaint itself. Before embarking upon the consideration of the merits of this complaint, the Board entertained evidence and submissions with respect to this issue of delay.
4. The essential facts are not in dispute. When the respondent Chrysler Canada Limited terminated the employment of the complainant, it was purportedly for "actual or attempted theft or misappropriation of property". As noted above, that discharge was grieved by the union. At the same time as that grievance was proceeding through the grievance procedure, the complainant was involved in various criminal proceedings arising out of the circumstances which led to his discharge.
5. The union withdrew the complainant's grievance in early September, 1981. Notwithstanding the allegations set out in the complaint filed in this proceeding, the evidence given at the hearing indicates that the complainant was notified shortly thereafter that his grievance had been withdrawn, and he admits he was aware of this fact no later than October, 1981. When Mr. Stroesser realized that his grievance had been withdrawn, he attended at the office of the lawyer handling his criminal matters, and was advised not to worry about the withdrawal of his grievance, since if he won his criminal proceedings his discharge could still be

arbitrated. Relying on this advice, the complainant took no further steps. He did not advise the union that he was in any way dissatisfied with its decision to withdraw his grievance.

6. By this time, the complainant had discharged the first lawyer he had retained for his criminal charges, and had retained different counsel to assist him with those charges. The complainant testified that neither of these two counsel had ever advised the complainant of his right to file a section 68 complaint with this Board. When the criminal matters were finally resolved, in early November, 1983, the complainant switched lawyers again, retaining the law firm representing him in these proceedings, and he was for the first time advised that he could file a complaint with this Board and indeed that he might have to resort to filing such a complaint in order to obtain an arbitration of his discharge.

7. In the period from his discharge in the fall of 1979 until his retention of current counsel in November of 1983, another former employee, John Connoy, who had also been discharged for alleged criminal activity had similarly been fighting those charges in the criminal courts. Mr. Connoy had been successful in his criminal proceedings, and had filed his own section 68 complaint with this Board on March 10, 1983. As noted, when Mr. Stroesser first met with his current counsel, sometime before November 14, 1983, he was told that he might have to file a complaint with this Board. He was also advised that if John Connoy won his section 68 complaint, and any resultant arbitration, there would be no problem with Mr. Stroesser winning his, but that there was nothing he could do until the Connoy arbitration was resolved. Mr. Stroesser explained the long delay in the filing of this complaint by his reliance on this advice from his counsel, and awaiting the results of the Connoy arbitration.

8. Mr. Stroesser's counsel forwarded to the union a letter, dated November 14, 1983, indicating that Mr. Stroesser was complaining about his grievance being dropped, without his prior permission, and requesting that the union advise counsel as to the circumstances surrounding the withdrawal of his client's grievance. Consequent upon that letter, counsel met with various officers of the union on November 28, 1983. During that meeting, those present agreed that if Mr. Connoy lost his grievance, then the Stroesser matter would be at an end and that no section 68 complaint would be filed. Several officers in attendance at that meeting testified as to what occurred. Counsel for the complainant urged upon the Board a different interpretation of that meeting, but it must be noted that counsel who was at that meeting, from the same firm, did not testify before this Board. The Board is satisfied that the union made abundantly clear to the complainant's counsel that it was not agreeing to try to reinstate the complainant's grievance, even if Mr. Connoy ultimately was successful in his arbitration.

9. In a further letter, dated January 23, 1984, counsel advised the union that he would be continuing to seek redress against the union for their failure to have properly represented the complainant. That letter was responded to by counsel for the union on March 14, 1984. That response dealt with various outstanding matters involving other clients represented by the complainant's counsel, including John Connoy, and noted, in part, as follows:

"Again, with respect to the withdrawal of the Norman Stroesser grievance, the position of the union is, that it properly performed all of its obligations with respect to the representation of this grievor as required by it under the *Labour Relations Act*. It is now a matter of surprise to my clients that you are making belated accusations against the U.A.W. when no complaint or objections were taken before. You may take it that your complaints with respect to the handling by the U.A.W. of the grievance of Norman Stroesser, are also rejected."

10. Nothing further happened until counsel for the complainant was advised in a letter

dated March 12, 1985 that the union had lost the arbitration over the discharge of John Connoy. This complaint was filed on June 17, 1985. There was no explanation offered for the delay between March 14, 1984, when union counsel advised complainant counsel by letter that the union denied any liability, and June 17, 1985, when this complaint was filed, except for the explanation noted above, that the complainant was advised by counsel that he had to wait for the results of the Connoy arbitration.

11. The Board approach to the consideration of delay in the filing of a complaint pursuant to section 89 of the Act has been canvassed in numerous decisions. As the Board stated in *Gary Hopkins*, [1985] OLRB Rep. May 684:

16. When events which form the subject matter of a complaint under section 68 of the Act occur a long time before the complaint is filed, the Board can call upon the complainant to show cause why the Board ought to exercise its discretion under section 89 of the *Labour Relations Act* to hear the complaint. In such an enquiry, the onus is on the complainant to convince the Board that the complaint ought to be heard (*Stelco Inc.*, *supra*).

17. It is true that the Act does not contain a strict limitation period for the filing of complaints under section 89. Surely this is to allow for the necessary flexibility in dealing with individual cases to ensure that justice is done to all parties. However, this Board has developed a clear jurisprudence which deals with the necessity of weighing the legitimate concerns of all members of the labour relations community. The Board's approach and its considerations have been described in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420 as follows:

20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E. 3 L.A.C. 980 (Laskin)*; and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* (1966) 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of response with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it: when the complainant first became aware of the alleged statutory violation: the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention: and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

18. In the case at hand, one can be sympathetic with an individual's difficulty in obtaining competent legal advice and with the frustrations which must have resulted from relying upon a lawyer who was subsequently disbarred. The legal profession may not have served the complainant very well. However, this Board has said many times that the respondent cannot be made responsible for any omissions or negligence on the part of the complainant's own agents. See *Sheller-Globe of Canada, Ltd.*, *supra* and *Chrysler Canada Limited*, *supra*.

In a similar vein see *Catherine Whittaker*, [1985] OLRB Rep. Apr. 621, *Savage Shoes Limited*, [1983] OLRB Rep. Dec. 2067, *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420, *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113.

12. The complaint as filed alleges that the union did not comply with the standards required of it under section 68 of the Act with respect to its failure to advise the complainant that its grievance had been withdrawn. The evidence, however, disclosed that the complainant had been advised of the withdrawal of his grievance a relatively short time after the grievance was withdrawn. The complainant himself testified to this effect. However, the Board has assumed, for consideration of the delay issue, the complainant has also been alleging impropriety because of the withdrawal of the grievance, and not merely the lack of notice that the grievance had been withdrawn.

13. Mr. Stroesser was aware that his grievance had been withdrawn by October, 1981. Mr. Stroesser had by then retained counsel for his criminal proceedings, who had advised him that there was nothing that could be done about his employment status until his criminal proceedings were finished. That counsel was aware, at the time this advice was given, that Mr. Stroesser's grievance had been withdrawn. Neither the respondent union nor the respondent company were notified at that time that Mr. Stroesser was dissatisfied because his grievance had been withdrawn. The first time the union was made aware of Mr. Stroesser's dissatisfaction was when they received a letter from Mr. Stroesser's then counsel, dated November 14, 1983, objecting to the withdrawal of the grievance. Insofar as the union was concerned, there had at that stage already been a two year delay between the time Mr. Stroesser was informed that his grievance had been withdrawn and their first awareness that he might be dissatisfied with that decision. The respondent company remained completely unaware of this dissatisfaction.

14. Contrary to the advice Mr. Stroesser was apparently receiving from his counsel (again, who did not testify in these proceedings), the union in November, 1983, made clear to counsel that they were not agreeing to attempt to reinstate the complainant's grievance, even if the Connoy arbitration proved ultimately successful. The union made this clear to Mr. Stroesser's counsel at the meeting on November 28, 1983.

15. Although the union might have been unsure of the complainant's position after that meeting, counsel for Mr. Stroesser sent a letter to the union dated January 24, 1984, which clearly indicated that Mr. Stroesser was still looking to the union for its failure to represent him properly. In response, in a letter dated March 14, 1984 from union counsel, the union again clearly stated that it denied any responsibility or liability for any failure to properly represent Mr. Stroesser. At that stage, it must have been clear to counsel for Mr. Stroesser that the union continued to deny that it had in any way breached section 68. It must also have been clear to counsel for Mr. Stroesser, given the conversations which occurred at the meeting with the union officials on November 28, 1983, that the union was not agreeing that they would again take up Mr. Stroesser's case if Mr. Connoy won at arbitration. Notwithstanding these factors, this complaint was not filed until approximately one year and three months later, on June 17, 1985. As noted earlier, this delay remains unexplained and unjustified. Counsel knew or ought to have known that a section 68 complaint might have to be filed; indeed, the very same counsel had filed such a complaint in March of 1983 on behalf of Mr. Connoy.

16. At best, there was a period from October, 1981, until November 14, 1983 (when counsel first advised the union of the section 68 potential), during which the complainant was aware that his grievance had been withdrawn but during which the union was not in any way put on notice of the complainant's dissatisfaction with that step. There was an additional delay from March 14, 1984, until the filing of this complaint on June 17, 1985, a period of approximately one year and three months. Taken cumulatively, the length of the delay insofar as the union was concerned was several months greater than three years. The respondent company was not advised of the complainant's concern until the filing of the complaint, and from their perspective, there was an unbroken period of delay of approximately three and one half years.

17. The events giving rise to the section 68 complaint took place over three and a half years ago. The reason for most, if not all, of this delay was the advice received by the complainant from his different counsel during this period. The first two counsel retained by the complainant both advised him that nothing could be done about his employment difficulties until his criminal matters had been completely resolved. In the Board's opinion that advice was incorrect, insofar as the resolution of those criminal proceedings would not effect a complainant's entitlement to file and pursue a complaint under section 68 of the Act. The complainant's third lawyer, retained after the criminal matters were resolved, advised the complainant that this complaint could not be filed until such time as the Connoy arbitration had been completed. Again, that advice was incorrect.

18. Neither the union nor the company were in any way responsible for any of the periods of delay involved. The Board is sympathetic to the difficult time the complainant appears to have had during the period in question, and we adopt the opinion expressed by the Board in *Gary Hopkins, supra* that "the legal profession may not have served the complainant very well". However, as neither the respondent union nor the respondent company were in any way responsible for this delay and the advice received by the complainant from his counsel, it would be unfair for them to bear responsibility for the effects of such advice. Those are matters that must be resolved between the complainant and his counsel directly. In the instant case, it is clear that the passage of time would seriously prejudice the respondents' ability to present their case and have a fair hearing, and both respondents would suffer the additional prejudice of unjustified disruption to their collective bargaining relationship.

19. For all these reasons, the Board exercises its discretion under section 89 not to inquire further into the complainant's allegations and this complaint is therefore dismissed.

2582-84-R; 2706-84-R Swingline/Rexel Inc., Applicant, v. United Steelworkers of America, Respondent; United Steelworkers of America, Applicant, v. **Swingline of Canada, Ltd.**, Swingline/Rexel Inc., Swingline Inc. and Rexel Inc. and Rexel Office Products Limited and American Brands Inc. and Marson Limited and Wilson Jones Limited and Canadian Staples Company, Respondents

Related Employer - Sale of a Business - Board considering whether related employer or sale provisions applying to groups of employees of companies subjected to reorganization

BEFORE: R. A. Furness, Vice-Chairman, and Board Members L. Collins and J. A. Ronson.

APPEARANCES: David Nicholson and Dave Martin for the United Steelworkers of America; Donald F. O. Hersey, Q.C. and Henry Epstein for applicant/respondent employers.

DECISION OF THE BOARD; May 27, 1986

1. In Board File 2582-84-R, Swingline/Rexel Inc. filed an application under section 63 of the *Labour Relations Act* with respect to the sale of a business by Swingline of Canada, Ltd. to Swingline/Rexel Inc. alleged to have taken place on or about May 1, 1984. It was the position of Swingline/Rexel Inc. that as a result of the sale of a business it was bound by a collective agreement entered into by the United Steelworkers of America ("USWA") and Swingline of Canada, Ltd. It was the position of Swingline/Rexel Inc. that a change in the character of the business so that it was substantially different from the business of the predecessor employer had not taken place and that an intermingling of employees of one business with employees of another business represented by a trade union had taken place. Swingline/Rexel Inc. requested the Board to declare that it had acquired the staple and staple machine manufacturing operations of Swingline of Canada, Ltd. and that it was accordingly bound by the collective agreement but only in so far as the agreement related to such operations and to the employees employed therein.

2. USWA in its reply adopted the position that Swingline/Rexel Inc. was not entitled to the relief claimed. It was the position of USWA that the reorganization amongst related companies of Swingline/Rexel Inc. did not constitute a sale. USWA stated in its reply that it had filed an application under section 1(4) and requested that it be heard and consolidated with the application of Swingline/Rexel Inc. under section 63 in order to avoid a duplication of proceedings. USWA put Swingline/Rexel Inc. to the strict proof of its entitlement to the relief claimed.

3. Subsequently, in Board File 2706-84-R USWA filed an application under section 1(4) of the Act. USWA submitted that all or some of the respondents named therein were carrying

on associated or related activities or businesses by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, notwithstanding the corporate reorganization of the American Brands family which had taken place recently. The respondents named therein did not file replies. USWA sought a declaration that the respondents named therein constituted one employer for the purpose of the Act.

4. During the course of the hearings, Swingline/Rexel Inc. withdrew its application under section 63 of the Act by leave of the Board in Board File 2582-84-R and USWA amended its application in Board File 2706-84-R to include an application under section 63 as a second best alternative to its application under section 1(4). In its application under section 63, USWA alleged that there had been a sale of a business by Swingline of Canada, Ltd. to Swingline/Rexel Inc., Marson Canada Inc. and Wilson Jones, Division of Acme Seeley Inc. on or about May 1, 1984. It was the position of USWA that as a result of the sale of a business, Swingline/Rexel Inc., Marson Canada Inc. and Wilson Jones, Division of Acme Seeley Inc. is bound by a collective agreement entered into by USWA and Swingline of Canada, Ltd. It was also the position of USWA that a change in the character of the business so that it is substantially different from the business of the predecessor employer had not taken place and that an intermingling of the employees of one business with employees of another business represented by USWA had not taken place.

5. Reference was made earlier to the American Brands family. This proceeding before the Board involves various subsidiary companies of American Brands, Inc. which grew out of The American Tobacco Company, founded in 1890. American Brands Inc., is the result of a programme of diversification which began in 1966 and which now encompasses a wide range of core businesses separate and apart from tobacco and tobacco products. The activities and metamorphosis of some of the subsidiaries of American Brands, Inc., in Ontario will now be considered.

6. Henry Epstein became, on May 1, 1984, vice-president and general manager of Swingline/Rexel Inc. He reports to David Miller, the president of Swingline Inc., at Long Island City, New York. Prior to his present position, Mr. Epstein was vice-president and general manager of Ofrex Group Canada Limited and was located in Mississauga, Ontario. At the present time Swingline/Rexel Inc. is located at 11 Ingram Drive in Toronto. Ofrex Group PLC of London, England was the owner of Ofrex Group Canada Limited. The latter company is owned by American Brands, Inc. Prior to May 1, 1984, Swingline of Canada, Ltd. was owned by MCM Products, Inc. and once again this ownership may be traced back to American Brands, Inc. In the Toronto area, American Brands, Inc. through various subsidiaries owns Humpty Dumpty Potato Chips, Andrew Jergens Company Limited, Benson & Hedges Tobacco, Pinkerton Securities, Gold Belt Tobacco, Co-operative Chemicals and other well known companies. Mr. Epstein testified that Swingline/Rexel Inc. is not associated or related in any of its business activities with either Acme Seeley Inc. or Wilson Jones, Division of Acme Seeley Inc. He further testified that the same is true with respect to Marson Canada Inc. Swingline/Rexel Inc. does not share common manufacturing facilities with either Wilson Jones, Division of Acme Seeley Inc. or Marson Canada Inc. In addition, Swingline/Rexel Inc. does not have common directors with these two companies. Swingline/Rexel Inc. has its own advertising budget, its own catalogue and does not share either sales or purchasing personnel with these other two companies. Swingline/Rexel Inc. prepares its own budget and Mr. Miller reviews the budget with Mr. Epstein. Marson Canada Inc. and Wilson Jones, Division of Acme Seeley Inc. do not have any input into the budget prepared by Mr. Epstein.

7. It was the evidence of Mr. Epstein that Swingline/Rexel Inc. is in the stapler and staples business, whereas Marson Canada Inc. is in the automobile after market, such as, for example, body fillers, and that Wilson Jones, Division of Acme Seeley Inc. is in the paper products market, such as, for example, expandable filing products and other office paper products. While Swingline/Rexel Inc., Marson Canada Inc. and Wilson Jones, Division of Acme Seeley Inc. all share a building on Ingram Drive, they have different entrances and different addresses. As was stated earlier, the address of Swingline/Rexel Inc. is 11 Ingram Drive. Marson Canada Inc.'s address is 7 Ingram Drive and the address of Wilson Jones, Division of Acme Seeley Inc. is at 9 Ingram Drive. In addition, each of these three companies has its own separate sign outside the building. The office and production facilities of the three companies in the building on Ingram Drive are located on two floors. The eating area for the employees of Swingline/Rexel Inc. is not shared with employees from the other two companies. Swingline/Rexel Inc. pays rents to Marson Canada Inc. for the use of its premises on Ingram Drive and has spent about twelve thousand dollars in alterations to the premises to make them more suitable for the activities of Swingline/Rexel Inc. A system of fences, doors and alarms separates the facilities of the three companies within the building. The manufacturing facilities of Wilson Jones, Division of Acme Seeley Inc. are located on the upper floor of the building, while the manufacturing facilities of Swingline/Rexel are located on the lower floor of the building. While the office washrooms are separated, the plant washrooms for Swingline/Rexel Inc. and Wilson Jones, Division of Acme Seeley Inc. are shared. The production and office facilities of Marson Canada Inc. are located entirely on the lower floor.

8. During the first part of 1984, Swingline Inc. decided that their product was not being sold in Canada in the quantities they felt it should be. Swingline Inc. attributed that to the fact that Swingline of Canada, Ltd. was selling three different product groups. Swingline Inc. made the decision that the control of their product line should be handled by someone else. Representatives of Swingline Inc. approached the representatives of Ofrex Group PLC in the United Kingdom about the possibility of obtaining a stronger nucleus and a stronger product group in Canada if Swingline's products and the products of another company called Rexel were put together so that staplers and staples would be sold by the same company. Swingline/Rexel Inc. is engaged in the same product line as Swingline of Canada, Ltd., except that it was strictly a distribution company with no manufacturing facilities. Accordingly, the decision was made to put together the product lines from Swingline of Canada, Ltd. which was owned by MCM Products, Inc. together with Swingline Inc.'s products. Swingline Inc. felt that if they were to take another route, they could have their own people who represented them and would do a better job of marketing the products. In other words, Swingline of Canada, Ltd. was controlled by MCM Products Inc. and that was the change that Swingline Inc. wanted to make and they made it. On April 1, 1984, Ofrex Group Canada Limited was sold by Ofrex Group PLC to Swingline Inc. In April of 1984, Swingline/Rexel Inc. purchased capital equipment from Swingline of Canada, Ltd. to the value of over three hundred thousand dollars. In addition, Swingline/Rexel Inc. as of December of 1984, owed Marson Canada Inc. over seven hundred thousand dollars in inventory and over fifty thousand dollars for the good will in connection with the Ace brand of stapler. In November of 1984, the name of Ofrex Group Canada Limited was changed to Swingline/Rexel Inc.

9. When Ofrex Group Canada Limited was in business it was located in Mississauga where it carried on a warehousing operation dealing with staples, staplers and other products which are no longer handled by Swingline/Rexel Inc. Most of the products were imported

from the United Kingdom, particularly from the parent company Ofrex Group PLC. At that time the staff consisted of between eight and ten office people together with about five employees in the warehouse. When the change in name came to Swingline/Rexel Inc. accompanied by the move to Ingram Drive, the office employees came and Swingline/Rexel Inc. changed its methods. Swingline/Rexel Inc. did not hire any office employees from Swingline of Canada, Ltd. or from Marson Canada Inc. When Swingline/Rexel Inc. moved to Ingram Drive they were strictly in the business of warehousing. However, upon the move to Ingram Drive they picked up the manufacturing of staples from Marson Canada Inc. At the time of the move to Ingram Drive, Swingline/Rexel Inc. hired about sixteen former employees of Swingline of Canada, Ltd. These employees had been covered by the collective agreement with USWA. Mr. Epstein testified that Swingline/Rexel Inc. contacted the USWA and told them who they were and what they would be doing. USWA was told that Swingline/Rexel Inc. would be honouring the basic terms and conditions of a collective agreement which had been entered into between USWA and Swingline of Canada, Ltd. Mr. Epstein informed the Board that Swingline/Rexel Inc. had tried to sign a collective agreement with USWA with respect to the manufacturing workers but had not received any response to their offer. He informed the Board that Swingline/Rexel Inc. has entertained grievances under the collective agreement and has gone on to arbitration and that moreover, Swingline/Rexel Inc. has a seniority list which has been in place since May 1, 1984.

10. During the time period when Mr. Epstein was hospitalized, David Martin, a representative of USWA, met with John Vota, a labour relations specialist from Swingline Inc. who was visiting Toronto. At that meeting, Mr. Vota made it clear to Mr. Martin that Swingline/Rexel Inc. was an existing company which was taking over an existing product line from another company and that it was not obligated to honour the collective agreement which had been in force between USWA and Swingline of Canada, Ltd. as it pertained to office staff. This meeting was held on April 27, 1984. It was the evidence of Mr. Epstein that since April of 1984, the USWA has not attempted to apply the collective agreement with Swingline of Canada, Ltd. with respect to the office employees of Swingline/Rexel Inc. With respect to sharing the building on Ingram Drive, Swingline/Rexel Inc. has a letter from Marson Canada Inc. which sets forth the square footage which is being occupied by that company and states the monthly charges to be made to Marson Canada Inc. The joint occupation of the building has caused the companies to use certain common areas for the moving of products within the building. These common areas which are marked with yellow lines have been assessed by the appraisers for the municipality on a split of fifty/fifty between Swingline/Rexel Inc. and Wilson Jones, Division of Acme Seeley Inc. Where it is necessary to share facilities, these two companies share them. Such as, for example, the sharing of common shipping doors. However, in these areas they do not share a common shipping desk or use common shippers. Each company has its own forklift truck. However, these two companies do share a common time clock for the use of their employees.

11. Mr. Epstein testified that when it comes time to negotiate a collective agreement for the plant employees, the parameters for negotiating will be set by himself, Mr. Miller and Mr. Vota. There are no plans to have joint discussions with either Wilson Jones, Division of Acme Seeley Inc. or with Marson Canada Inc. The transition which occurred in the corporate divisions of American Brands, Inc. were put into effect in April and May of 1984 and there was very little time for the three companies to arrange their affairs in the new setting. For example, the representatives of Wilson Jones, Division of Acme Seeley Inc. who are located in Renfrew did not have enough time to set up an office on Ingram Drive. This caused an

arrangement to be worked out with Swingline/Rexel Inc. whereby for a period of about five weeks these two companies shared offices and the office staff of Swingline/Rexel Inc. did the work for Wilson Jones, Division of Acme Seeley Inc. until the latter was able to provide its own office employees. It was the evidence of Mr. Epstein that none of the directors of Swingline Inc. were directors of Marson Canada Inc. or of Wilson Jones, Division of Acme Seeley Inc. He testified that American Brands, Inc. owns one hundred per cent of Swingline Inc. and that Swingline Inc. owns one hundred per cent of Swingline/Rexel Inc.

12. In cross-examination, Mr. Epstein agreed that the name of Swingline/Rexel Inc. had been used on May 1, 1984, at the time of the takeover, but that the name of Swingline/Rexel Inc. was not in existence until November of 1984. He also agreed that previously Ofrex Group Canada Limited had been owned one hundred per cent by Ofrex Group PLC, which had in turn been owned one hundred per cent by Gallaher Limited and that Gallaher in turn was owned one hundred per cent by American Brands, Inc. Mr. Epstein explained that the reorganization had been necessary on May 1, 1984, because Swingline Inc. in the United States had no control over Swingline of Canada, Ltd. even though their products had been sold in Canada by this company. On the other hand, the Ofrex Group was a competitor of Swingline of Canada, Ltd. for many years and had been controlled by the Ofrex Group in the United Kingdom. The decision to have the Canadian company a subsidiary of the American company was decided upon because it was thought to be better to do so in recognition of the fact that the markets in the two countries are very closely related with respect to marketing and sales, whereas the situation in the United Kingdom was quite different. The witness explained that Swingline of Canada, Ltd. previously had three different operations and that these operations had been split up into different hands. Mr. Epstein testified that Swingline of Canada, Ltd. had become Marson Canada Inc. with merely a change of name. And by way of a parallel example, the witness stated that Swingline/Rexel Inc. was Ofrex Group Canada Limited with a change of name. Mr. Epstein explained that Swingline Inc. never bought Swingline of Canada, Ltd. because Swingline of Canada, Ltd. had been owned by MCM Products, Inc. The reality of the situation as viewed by the witness was that Swingline Inc. merely wanted the control over the marketing and distribution of the products that they manufacture. This led to the closing of the plant in Mississauga and the relocation on Ingram Drive. The witness agreed that the president of Swingline/Rexel Inc. was on the board of directors of Swingline Inc. And that Swingline/Rexel Inc. buys its products from Swingline Inc. and sells them in the Canadian market.

13. On further cross-examination, the witness confirmed that Mr. Miller comes to Toronto in July or August and goes over the budget once it has been prepared and also takes the opportunity to discuss the corporate plans of Swingline/Rexel Inc. for the coming year. Mr. Epstein agreed that he attended the reorganizational meetings in February or March of 1984. He attended the meeting on behalf of Ofrex Group Canada Limited. The meeting was held to explain how the changes which would come into effect on May 1, 1984 with respect to Swingline of Canada, Ltd. would affect the three companies which would be in operation on May 1, 1984. Representatives from Swingline Inc. attended the meeting as did Alexander Laco and another director on behalf of Marson Canada Inc. and Joseph Fitzpatrick on behalf of Acme Seeley Inc. in Renfrew and Richard Bowden from Wilson Jones, Division of Acme Seeley Inc. The meeting was chaired by Frank Spender who is one of the comptrollers with American Brands, Inc. He co-chaired the meeting as did Dick Lowden also from American Brands, Inc. in their financial planning department. The latter was there to administer the amounts to be paid by Swingline/Rexel Inc. and Wilson Jones, Division of Acme Seeley Inc.

to Marson Canada Inc. At the reorganizational meeting there was no discussion of manpower needs. This was left to the individual companies and each company was required to hand in proposals with respect to what they needed to operate their companies. The meeting served to correct any overlaps between the competing needs of the three companies. When disagreements arose as to value and necessity of items which were to be paid for, Mr. Spender ironed out disputes and also adjusted competing demands with respect to space, inventory, fixed assets, and any problems of the three companies. In the words of Mr. Epstein, he was there as an outside party to make a binding decision on the issues in dispute.

14. In additional cross-examination, Mr. Epstein explained that the Rexel name originates in the United Kingdom as part of Ofrex Group PLC and that a stapler of that name is manufactured there and sold in Canada by Swingline/Rexel Inc. The witness explained that he agreed with Mr. Vota's position that the reorganization involved an existing company taking over an existing product line and that in these circumstances, Swingline/Rexel Inc. was not obligated to honour the collective agreement between the USWA and Swingline of Canada, Ltd. The witness agreed that the position of USWA was just the reverse. Mr. Epstein explained that the seniority list put into effect by Swingline/Rexel Inc. was with respect to the employees who started working for Swingline/Rexel Inc. on May 1, 1984. Some of the employees had told Mr. Epstein that they went through the bumping positions of the collective agreement with Swingline of Canada, Ltd. for their jobs. He explained that when Swingline/Rexel Inc. was approached on the issue of employees retaining their seniority, he agreed to do so as a show of good faith and to unequivocally state the commitment of Swingline/Rexel Inc. to continue to operate at Ingram Drive. It was the evidence of Mr. Epstein upon cross-examination that it was the position of Mr. Martin that all employees of Swingline/Rexel Inc. were covered by the collective agreements formerly with Swingline of Canada, Ltd. and that until that was resolved, no discussions could take place with respect to a separate collective agreement for the manufacturing employees. It was Mr. Epstein's position that Swingline/Rexel Inc. wanted a separate collective agreement for the manufacturing employees.

15. In further cross-examination, the witness explained how the reorganization had changed the areas on Ingram Drive formerly occupied by Wilson Jones, Division of Acme Seeley Inc. and now occupied by Marson Canada Inc. and Swingline/Rexel Inc. The witness explained that the difference between Swingline/Rexel Inc. and Swingline of Canada, Ltd. with respect to functioning was that Swingline of Canada, Ltd. had two products, namely, staplers and staples, and that Rexel had some plastic products too. Ofrex Group Canada Limited had no manufacturing facilities at all and was strictly involved in warehousing and distribution. Swingline of Canada, Ltd. in general had a sales force across Canada and that company employed individuals across Canada in that capacity. Rexel employed the majority of manufacturers representatives across Canada. However, such people were not employees and worked as commission agents. While Swingline of Canada, Ltd. was dealer-oriented and sold from dealers to dealers from coast to coast, Rexel was oriented more towards the wholesale market and that if incoming orders were not filled, then such orders would be routed through the wholesalers. Mr. Epstein stated that Swingline/Rexel Inc. had never asked employees to work beyond eight hours and if they did they would pay overtime. He further explained that the office staff and the whole organization of handling by Swingline/Rexel Inc. had changed from the way it formerly was in that orders by mail, telephone or telex are handled differently from the way they were handled by Swingline of Canada, Ltd. Swingline/Rexel Inc. has gone over to a computerized environment, whereas Swingline of Canada, Ltd. was more oriented to a manual office. By way of a similar comparison, the witness stated that Swingline of

Canada, Ltd. and Swingline/Rexel Inc. both carried the Swingline brand of staples and staplers. The witness expressed the belief that the president of Swingline Inc. and the president of Wilson Jones Company and the president of MCM Products, Inc. arranged the reorganization so that their products could be sold in Canada directly by subsidiaries of the American parent companies.

16. Alexander Laco informed the Board that he was formerly the president of Swingline of Canada, Ltd. and was currently employed by Marson Canada Inc. and was its president. The three directors of Marson Canada Inc. as of May 1, 1984, were himself, Bob McIntyre and Judy Listiak. None of them were directors of Swingline of Canada, Ltd. The parent company of Marson Canada Inc. is the Marson Corporation of Chelsea, Massachusetts. This company owns one hundred per cent of the share of Marson Canada Inc. None of the directors of the Marson Corporation are directors of Wilson Jones, Division of Acme Seeley Inc. or Swingline Inc. The Marson Corporation in turn is owned one hundred per cent by MCM Products, Inc. and that company is in turn owned one hundred per cent by American Brands, Inc. Mr. Laco described the products of Marson Canada Inc. as automotive body plastics, rivets, hand tools and various other accessories having to do with car maintenance and repair. He gave evidence that Marson Canada Inc. does not share any common products lines with either Wilson Jones, Division of Acme Seeley Inc. or Swingline/Rexel Inc. Marson Canada Inc. has prepared its own catalogue and does not engage in advertising in common with either Swingline/Rexel Inc. or with Wilson Jones, Division of Acme Seeley Inc. The three companies do not participate together in any trade fairs and do not share computer facilities. He explained that there was no common budget and that there were no regular meetings with the other two companies. The banking and payroll systems are different and there is no common sales or marketing staff. The companies do not share a switchboard or reception area and have not engaged in any related activities with any companies of American Brands, Inc. in the Toronto area. Marson Canada Inc. has its own shipping/receiving area, its own time clock, and its own separate entrance. However, the lunchroom for employees is shared with other companies in the building. In readying the building on Ingram Drive for the reorganization which came into effect on May 1, 1984, Marson Canada Inc. spent one hundred and ninety thousand dollars. To the witness's knowledge, Swingline/Rexel Inc. and Wilson Jones, Division of Acme Seeley Inc. spent additional amounts in order to prepare their portion of the premises for their own needs. Mr. Laco gave evidence that the object of the leasehold changes was to facilitate the independence of the three companies and for security reasons.

17. Mr. Laco repeated the reasons given by Mr. Epstein for the reorganization of the companies affected by this application. He testified that Swingline Inc. and Wilson Jones, Division of Acme Seeley Inc. felt that their companies in Canada were not getting enough assistance in marketing their products and so decided upon a scheme to split up Swingline of Canada, Ltd. in the way previously described. Previously, Marson had sold what was associated with office supply companies in addition to its marketing of products for the automobile after market. He gave evidence that the lease on the building on Ingram Drive was in the name of Swingline of Canada, Ltd. and that Marson Canada Inc. sold assets and inventory to Swingline/Rexel Inc. as a surviving company. While Swingline of Canada, Ltd. was still in existence the witness informed the Board that Marson Canada Inc. is now the landlord under the lease. Marson Canada Inc. assumed the liabilities of Swingline of Canada, Ltd. and gradually the latter will disappear. The other two companies have no connection with Swingline of Canada, Ltd. He informed the Board that collective agreements had been prepared between Marson Canada Inc. and the USWA, but had not been signed by the USWA upon

presentation. The witness had no explanation as to why the USWA had declined to sign collective agreements with respect to the plant and office employees of Marson Canada Inc. It was the position of Mr. Laco that Marson Canada Inc. is the successor of Swingline of Canada, Ltd. and that Marson Canada Inc. was continuing to employ former employees of Swingline of Canada, Ltd. as they were required. He testified that Marson Canada Inc. supplied a list of employees to the other two companies so that they could decide which employees they required to perform their operations.

18. The collective agreements which existed between Swingline of Canada, Ltd. and the USWA provided for seniority which covered the three divisions of the company, namely, the Marson Division, the Wilson Jones Division and the Swingline Division. The witness emphasized that the seniority covered all three divisions and was applied notwithstanding the different product lines of the different divisions. Mr. Laco gave evidence that there had been a history of no layoffs in twenty-five years and that only in 1982 were layoffs necessary. A failing economy caused this and in the 25-year period employees would have gone from one division to another. In 1982 there were layoffs and some of the employees escaped layoffs by being able to bump into another division. However, this was not done frequently and he was not aware of a person who would work a full shift for one division and then work for another division. If this happened, in the view of Mr. Laco, he would presumably have been paid overtime. Mr. Laco also gave evidence that a number of the directors of Marson Canada Inc. are also directors of the the Marson Corporation. Mr. Laco was involved in the implementation meetings and his opinion was requested and was given with respect to what had to be done, commitments regarding assets, costs, money being paid and when it was to be paid and various miscellaneous matters. He was, for example, asked his opinion on the number of employees necessary to operate the companies from the standpoint of manufacturing. In addition, he was asked for his recommendations with respect to severance pay for employees who were affected by the reorganization. He gave evidence that a number of employees exercised their option to bump other employees at that time.

19. In cross-examination, Mr. Laco explained that he had worked with the family of companies of American Brands, Inc. for over thirty years and that when it first became an operation in Canada it was called Wilson Jones in the 1960's. From that point, the name Wilson Jones became Swingline of Canada, Ltd. and as companies were added in the form of Canadian subsidiaries of American parents the name was changed to accommodate these moves. Divisions were added and sometimes discontinued. For example, the Canadian Staples Division used to distribute the Ace product line of staplers. Canadian Staples as a division has been included for some time in the Swingline Division. The witness also explained that in the early 1980's Swingline of Canada, Ltd. had included in its group of divisions a commercial lighting division. However, this division was not profitable and was closed on the recommendation of Mr. Laco. A line of products called Cook and Cobb were part of, and are still part of, the Wilson Jones Division. There was an association with parent companies in the United States before MCM Products, Inc. was brought in as a parent company in the late 1970's. Prior to that time, Swingline of Canada, Ltd. reported directly to Swingline Inc. At that time its parent was American Brands, Inc. The witness also explained that the Wilson Jones company in the United States was itself a parent in the 1950's before it became part of the family of companies under American Brands, Inc. Mr. Laco agreed that there had been a bargaining relationship with the USWA since 1973 and that this bargaining relationship included the Marson, Swingline, Wilson Jones and Canadian Staples divisions. In the 1970's and early 1980's, the Marson division might have shared a few packaged product lines with

the other divisions and have distributed them to hardware stores. However, this practice has since disappeared and since 1983 Marson has not shared any product lines with the other divisions. There has not been an assignment of the lease on the premises on Ingram Drive to Marson Canada Inc. and Marson Canada Inc. has not entered into subleases with Swingline/Rexel Inc. or Wilson Jones, Division of Acme Seeley Inc. Rather, Marson Canada Inc. has received letters of intent to pay the agreed rent on the premises. Mr. Laco informed the Board that the sales staff had not previously been covered by either the plant or office collective agreements between Swingline of Canada, Ltd. and the USWA. Mr. Laco agreed that he had sent a letter dated April 13, 1984, to Mr. Martin of the USWA in which he advised him on behalf of Swingline of Canada, Ltd. that approximately ten union employees would become employees of Marson Canada Inc., that approximately nineteen union employees would be transferred from the employ of Swingline of Canada, Ltd. to Wilson Jones, Division of Acme Seeley Inc. and that approximately nineteen employees would be transferred from the employ of Swingline of Canada, Ltd. to Swingline/Rexel Inc. Mr. Laco noted, however, that after May 1, 1984, he would have had no authority to speak on behalf of the other two companies. He agreed that no one from Swingline Inc. or Swingline/Rexel Inc. was on the boards of either Wilson Jones, Division of Acme Seeley or Marson Canada Inc. or the Marson Corporation.

20. Joseph Fitzpatrick testified that he is located in Renfrew and for approximately three years he has been the vice-president and general manager of Acme Seeley Inc. The employees of Wilson Jones at Ingram Drive report to him and he is responsible for the Wilson Jones Division. He reports directly to Acme Visible Records, a Division of Wilson Jones in Crozet, Virginia. Acme Visible Records is, in turn, a division of the Wilson Jones company which is located in Chicago. Acme Seeley Inc. has been located in Renfrew since September of 1971, where it has a manufacturing operation and office employees. Since 1973, it has been a party to successive agreements with the United Steelworkers of America, Local 8177. At the time of the hearing, the most recent collective agreement covered the period from January 2, 1984, to January 3, 1986. The recognition clause of the collective agreements provides that the company recognizes the union as the sole bargaining agent for all its employees at Renfrew, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period. In Renfrew, Acme Seeley Inc. makes office business systems and within its manufacturing facility of one hundred thousand square feet has full metal manufacturing and full printing facilities. Prior to the reorganization at Ingram Drive, Acme Seeley Inc. was making filing cabinets which were of a similar type to the ones made in Renfrew. Mr. Fitzpatrick explained that when the decision was made to split Swingline of Canada, Ltd., the Wilson Jones Division was the smallest of the three operations and it was decided to make it a division of Acme Seeley Inc., that is to say, a Wilson Jones Division of Acme Seeley Inc. It was the belief of the witness that the decision was made through Thomas Miller, who is the president of the Wilson Jones company in Chicago. In about mid-April of 1984, Mr. Fitzpatrick was called to a two-day meeting in Toronto in order to take part in the planned reorganization of Swingline of Canada, Ltd.

21. Mr. Fitzpatrick gave evidence that the prime concern regarding the Wilson Jones operation was that it had a very good sales record in the United States and a very poor one in Canada. There was concern about not getting good representation in Canada. At the meeting the concern of Mr. Fitzpatrick and other representatives on the Wilson Jones team from the United States there was concern about the layout of the building on Ingram Drive and they wanted to have some input into which parts of the building they were going to rent. At the meeting negotiations were held and decisions were made to establish values in connection with

the reorganization. As a result of the two-day meeting, Wilson Jones decided to establish a full division of Acme Seeley Inc. and have it controlled out of Renfrew. Acme Seeley Inc. purchased the assets and inventory of the Wilson Jones Division of Swingline of Canada, Ltd. The witness explained that the Wilson Jones Division acquired employees from Swingline of Canada, Ltd. based upon a list submitted by Mr. Laco. The Wilson Jones Division maintained the same wage rates in effect in the collective agreement at that time. Mr. Fitzpatrick testified that the Wilson Jones Division of Acme Seeley Inc. had never signed a collective agreement with the USWA in Toronto because it had never been approached to do so. He explained the office split took place in two stages because the Wilson Jones Division did not have facilities available at that time and that during that time Swingline/Rexel Inc. handled their billings during the period from May through July of 1984. While the Wilson Jones Division had three or four office people at Ingram Drive, they were primarily working in sales and were not engaged in the billing side of the business. During that time Swingline/Rexel Inc. had six or seven office employees doing the work for the Wilson Jones Division. At the end of the three-month period, the Wilson Jones Division had its own office prepared and it hired employees to pick up some of the functions. Part of the functions were moved to Renfrew, such as accounts payable and the payroll matters. Of the seven office employees of the Wilson Jones Division at Ingram Drive, three of them are regarded by Mr. Fitzpatrick as managerial. The Wilson Jones Division did not consider hiring former office employees of Swingline of Canada, Ltd. It was the evidence of Mr. Fitzpatrick that the USWA never approached him about hiring former office employees of Swingline of Canada, Ltd. It was the position of Mr. Fitzpatrick that while there was no collective agreement in effect covering the hourly paid production employees of the Wilson Jones Division at Ingram Drive, he was following the terms and conditions of the appropriate plant collective agreement between Swingline of Canada, Ltd. and the USWA.

22. The witness gave evidence that the Wilson Jones Division spent about thirty-one thousand dollars on office renovations and that the cost of walls and fencing had been paid for and the portions distributed therefor at the time of the reorganization. He informed the Board that the Wilson Jones Division has its own private entrance, telephone, telex, inventory storage and manufacturing areas. Mr. Fitzpatrick informed the Board that he had never seen the office collective agreement between Swingline of Canada, Ltd. and the USWA. However, he became aware of it some time after the reorganization. When questioned about the difference between Acme Seeley Ltd. and Acme Seeley Inc., the witness explained that this was simply a change of name in 1980, in order to have a bilingual name and accommodate Quebec. He stated that none of the directors on the board of Acme Seeley Inc. were directors on any other boards of the other companies at Ingram Drive. In concluding his testimony, Mr. Fitzpatrick testified that he had no idea why the USWA had not approached him with regard to the hourly employees in the plant on Ingram Drive because he had such good relations with the USWA in Renfrew.

23. In cross-examination, Mr. Fitzpatrick stated that he had been with Seeley Systems and then with Acme Seeley Inc. since January of 1947. He explained that Wilson Jones has been the parent of Acme Visible Records for a little over a year, that Acme Visible Records is the direct parent of Acme Seeley Inc. and that Acme Visible Records is, in turn, owned by the Wilson Jones company. At the time of the reorganization, the question of good will was never discussed and the accounts receivable and inventory of the Wilson Jones Division of Swingline Canada, Ltd. was purchased by Acme Seeley Inc. The capital equipment was allocated at the reorganizational meeting and some of it was sent to Toronto and some remained

in Toronto. Not all of the capital equipment was satisfactory and some of it had to be scrapped. The witness agreed that the shared space with Swingline/Rexel Inc. included the shipping bay, the employees entrance and time clock. The Wilson Jones Division has its own washrooms in the front of the building but shares washrooms for the plant employees in another part of the building. At one time employees who worked for one of the other divisions worked for the Wilson Jones Division part-time. However, this ended when Mr. Fitzpatrick discovered it. These employees were not paid overtime for the time spent working for the Wilson Jones Division.

24. It was the recollection of the witness that the Wilson Jones Division did not have a lease with respect to the building on Ingram Drive and that it had not signed a letter of intent with Marson Canada Inc. However, he agreed that the Wilson Jones Division would pay its allotted rental share of the building to Marson Canada Inc. Mr. Fitzpatrick candidly stated that the building on Ingram Drive was a detriment to Acme Seeley Inc. and that he did not particularly like the building. This was particularly true because Acme Seeley Inc. owns its own premises in Renfrew. It was the view of Mr. Fitzpatrick that the decision was made to continue using the building on Ingram Drive because of a long-term lease on that building. He agreed that the Wilson Jones Division reimbursed Swingline/Rexel Inc. with respect to the office work performed by them on behalf of the Wilson Jones Division. There is no interchange of employees between Swingline/Rexel Inc. and the Wilson Jones Division. He agreed that some of the directors of Acme Visible Inc. are also directors of American Brands, Inc. Mr. Fitzpatrick is involved in setting the budget and capital expenditures of Acme Seeley Inc. Once the budget and capital expenditures are prepared they are sent to Vernon Schroeder of Acme Visible Records for his approval. Mr. Schroeder is also a director of the Wilson Jones company. With reference to a letter dated April 23, 1984, from Richard Bowden, the director of marketing of Swingline of Canada, Ltd., Mr. Fitzpatrick gave evidence that while he knew that Mr. Bowden would be working for the Wilson Jones Division, he was not speaking on behalf of the Wilson Jones Division when he stated that that division would not be having any office employees. Mr. Fitzpatrick noted that in that letter it was stated that the Wilson Jones Division would be honouring the plant collective agreement formerly in effect with Swingline of Canada, Ltd.

25. In re-examination the witness stated that he had not authorized the letter of April 23, 1984, and that at that time Mr. Bowden was still working for Swingline of Canada, Ltd. and was reporting to Mr. Laco. As far as the witness was aware, no one in the Wilson Jones Division had given Mr. Bowden the authority to write this letter. The witness re-emphasized that there had been no meetings with the USWA and the Wilson Jones Division with respect to a plant collective agreement. The witness repeated that Acme Seeley Inc. was one hundred per cent owned by Acme Visible Records, which was, in turn, one hundred per cent owned by the Wilson Jones company in Chicago, which was itself, in turn, one hundred per cent owned by American Brands, Inc.

26. David Martin, a staff representative with the USWA, took over responsibilities for the collective bargaining with Swingline of Canada, Ltd. in the Fall of 1983. Bargaining also occurred at that time and on the other side was counsel for Swingline of Canada, Ltd., Mr. Laco and other representatives of that company. Collective agreements for the plant and office were eventually settled during these negotiations. In January of 1984, a memorandum of settlement which applied to both the plant and office collective agreements was signed between Swingline of Canada, Ltd. and the USWA. However, a formal collective agreement was never

entered into. The witness testified that he made attempts to have formal collective agreements signed with Swingline of Canada, Ltd., but that no attempts were made to sign collective agreements with the individual new companies which emerged after the reorganization. The witness stated that he did not negotiate with anyone on behalf of the new companies with a view to signing collective agreements with them. Mr. Martin also stated that he had never negotiated with Mr. Laco as president of Marson Canada Inc. After a series of unsatisfactory contacts from the point of view of the USWA and Mr. Laco, Mr. Martin put the matter in the hands of counsel for the USWA. He informed the Board that he had not solicited the letter from Mr. Bowden dated April 23, 1984, and that, in his view, the matter was in the hands of his counsel. He did not know Mr. Bowden and believed he was speaking on behalf of the Wilson Jones Division. He informed the Board that he had never received a letter on behalf of the Wilson Jones Division with respect to honouring the collective agreement for the plant.

27. In cross-examination, the witness stated that he had never seen a copy of a formal collective agreement with the name of Marson on it. A draft collective agreement was filed with the Board with the name "Marsen Canada Ltd." on it. There was no explanation for this variation in the name or as to the authorship of that name. In this draft collective agreement the company, namely, Marsen Canada Ltd., purported to recognize the USWA as the bargaining agent of all office and clerical employees at its plant in Metropolitan Toronto, with certain exceptions and subject to the qualifications referred to in the decision of this Board dated March 14, 1973. The witness agreed that at a meeting on April 19, 1984, which was attended by the witness, Mr. Laco and counsel accompanying Mr. Laco, he was advised that they were speaking on behalf of Swingline of Canada, Ltd. and Marson and that there was no authority to speak on behalf of the other two companies. Mr. Martin acknowledged that he first became aware that Swingline/Rexel Inc. and the Wilson Jones Division of Acme Seeley Inc. were not going to recognize the office bargaining units when Mr. Epstein's secretary advised him of a meeting. He attended on Mr. Epstein in Mississauga only to find that the latter was in hospital. However, instead he met Mr. Vota and it was at that point that Mr. Vota made it quite clear that Swingline/Rexel Inc. was not going to recognize any bargaining rights claimed by the USWA for office employees. He acknowledged that although it was his position that the divisions of Swingline of Canada, Ltd. were still part of the same corporate entity after the reorganization, this view of the companies was not accepted by those companies. Mr. Martin acknowledged that the office employees of Swingline of Canada, Ltd. had been laid off in the winter of 1983 and 1984 and that there had been no attempt by the USWA to have those employees hired by Swingline/Rexel Inc. or the Wilson Jones Division of Acme Seeley Inc. He pointed to the fact that he had reason to believe from the correspondence that the Wilson Jones Division of Acme Seeley Inc. would not require office employees and it was also his position that Swingline/Rexel Inc. had said that they were going to bring non-unionized employees from Mississauga to work at Ingram Drive.

28. The evidence before the Board establishes a highly plausible reason for the reorganization. The reason was in order to better utilize the resources and to improve the marketing techniques of the companies within the fold of American Brands, Inc. The reorganization was caused by a legitimate desire to improve the performance of certain core industries which American Brands, Inc. has been developing for the past two decades. The USWA accepts the reasons for the organization and has conceded that there has been no anti-union animus on the part of the corporate respondents. It is helpful to review the positions of the relevant corporate respondents with respect to the bargaining rights claimed by the USWA. Marson Canada Inc. is prepared to sign collective agreements with respect to both

its plant employees and its office employees. Marson Canada Inc. regards itself as the true successor of Swingline Canada, Ltd. with merely a change in name. Swingline/Rexel Inc., on the other hand, is prepared to acknowledge that an argument may be made that it has acquired certain of the business of Swingline of Canada, Ltd. with respect to certain manufacturing facilities. Swingline/Rexel Inc. is therefore prepared to sign a collective agreement with USWA with respect to its plant employees. It is not, however, prepared to sign a collective agreement with USWA with respect to its office employees. Swingline/Rexel Inc. takes the position that these are non-unionized employees which, for the most part, were brought in from Mississauga. The position of the Wilson Jones Division of Acme Seeley Inc. is somewhat similar to the position of Swingline/Rexel Inc. The Wilson Jones Division is prepared to sign a collective agreement for the hourly-rated employees in the plant who are performing work formerly performed by Swingline of Canada, Ltd. However, the Wilson Jones Division of Acme Seeley Inc. is similarly not prepared to sign a collective agreement with respect to what are, in its view, an entirely new and small unit of office employees at Ingram Drive. The attitude of the USWA has been to not enter into new collective agreements out of a concern that perhaps such conduct would be seen as resulting in compromising their position of claiming to represent employees in six bargaining units and not four bargaining units.

29. In our view, Marson Canada Inc. is the legal successor of Swingline of Canada, Ltd. and came into existence as a result of a change in name. The Board agrees with the position of Marson Canada Inc. that the USWA has bargaining rights with respect to two bargaining units of plant and office employees, respectively. With respect to the argument under section 1(4) of the *Labour Relations Act*, the Board has frequently stated that one of the purposes of that subsection is to prevent the erosion of bargaining rights. See *Industrial Mine Installations Ltd.*, [1972] OLRB Rep. Dec. 1029 and *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945. In *Walters Lithographing*, [1971] OLRB Rep. July 406, the Board set forth certain criteria for the purpose of determining whether there is common control or direction between two or more employers. In that decision the Board considered these criteria: a) common ownership or financial control; b) common management; c) interrelationship of operations; d) representation to the public as a single integrated enterprise; and e) centralized control of labour relations. With respect to the corporate respondents in this matter, there is ultimately common ownership and ultimate financial control through American Brands, Inc. However, with respect to the other four criteria, the Board notes that there is not common management, there is not an interrelationship of operations and there is not a representation to the public as a single integrated enterprise. Moreover, any claim of centralized control of labour relations is negated by the different positions taken by the corporate respondents in this matter. The Board notes that the three corporate respondents who are most closely connected with this application have gone to considerable pains to distance and separate their operations one from the other. In these circumstances, it may not be said that the three corporate respondents in question are under common control and direction. Moreover, in our view, it may not be said that they are in related or associated activities and businesses. As the Board stated in *Brant Erecting and Hoisting*, *supra*, businesses or activities are “related” or “associated” because they are the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and are carried on for the benefit of related principals. In the present case, even though it may be argued that American Brands, Inc. is a distantly related principal, there is quite clearly nothing of an associated or related business or activity between these three corporate respondents. The Board therefore dismisses this application in so far as it relates to a claim for relief under section 1(4) of the Act.

30. As the Board stated earlier, in our view, Marson Canada Inc. is clearly the legal successor of Swingline Canada, Ltd. As the Board stated in *Pitts Engineering Construction*, [1983] OLRB Rep. June 938, the Board has interpreted section 63 in a manner so as to protect the bargaining rights and not extend or create new bargaining rights. If the provisions of section 63 were applied to the facts in this application, it would have the effect of conferring representation by the USWA on two bargaining units of office employees who have never previously been represented by a trade union. In *Mountainview Dairy Ltd.*, [1967] OLRB Rep. Feb. 911, the Board declined to effect such a purpose. The purpose of section 63 has been described by the Board in *Aircraft Metal Specialties Ltd.*, [1970] OLRB Rep. Sept. 702 in these terms at page 705:

The purpose of section [63] becomes important in assessing the various fact situations that arise. Section [63] operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect "paper transactions", and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section [63] to preserve the bargaining rights and has attempted to look beyond "paper transactions" to achieve that purpose.

In the instant case the purpose of the reorganization has been referred to earlier. In our view, the position taken by the three corporate respondents has not resulted in the loss of any bargaining rights by the USWA, nor is it an attempt to undermine and erode the bargaining rights of the USWA.

31. The definition of a sale in section 63 includes a lease, transfer and any other manner of disposition. As the Board stated in *Westeel-Rosco Limited*, [1966] OLRB Rep. Dec. 718, the words in the definition section of "other manner of disposition" includes resuming a business pursuant to a reorganization of a business under the same corporate umbrella. This is an omnibus provision and as the Board also stated in *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052, the word "transfer" is a term of wide significance and is capable, as on the facts before us, of describing a multitude of transactions. The Board notes that Swingline/Rexel Inc. was prepared to sign a collective agreement with respect to the plant employees and the Board finds that with respect to the new manufacturing facilities there has been a sale of a business to Swingline/Rexel Inc. from Swingline of Canada, Ltd. Such employees, it appears, formerly worked for Swingline of Canada, Ltd. and are now doing the same work as they used to do for Swingline/Rexel Inc. This, however, is not true with respect to the office and sales staff. Therefore, the Board finds that there has not been a sale of a business with respect to the office and sales staff. Moreover, with respect to the office and sales employees, they are still selling and marketing products from Ofrex and Rexel and have added additional product lines from Swingline. In our view, it is merely the acquisition of a new product line for sale and is not in any sense of the word a sale of a business as contemplated by section 63.

32. With respect to Wilson Jones, Division of Acme Seeley Inc., the main operations are in Renfrew and the present position that the Wilson Jones Division finds itself in is due to the reorganization over which it had little control and which led to the employment for the first time of office staff at Ingram Drive. On the evidence before the Board, we find that there were no such office employees formerly employed by Swingline Canada, Ltd. and accordingly, it may not be argued that there has been a sale of a business with respect to such employees. It appears that with respect to the manufacturing activities carried on by the Wilson Jones

Division at Ingram Drive that there has been an acquisition of capital equipment from Swingline of Canada, Ltd. and that there is, in our view, a sale of a business from Swingline of Canada, Ltd. to Wilson Jones, Division of Acme Seeley Inc. with respect to the manufacturing facilities.

33. In brief, the Board dismisses the application under section 1(4) of the *Labour Relations Act* and finds that there has been a sale of a business under the provisions of section 63 of the *Labour Relations Act* with respect to the plant employees of Marson Canada Inc., the plant employees of Swingline/Rexel Inc. and the plant employees of Wilson Jones, Division of Acme Seeley Inc. With respect to the office employees, the Board finds that there has been a sale of a business with respect to the office employees of Marson Canada Inc. but not with respect to the office employees of either Swingline/Rexel Inc. or the office employees of Wilson Jones, Division of Acme Seeley Inc.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1986

BARGAINING AGENTS CERTIFIED

No Vote Conducted

3014-84-R: United Brotherhood of Carpenters & Joiners of America, Local 494, (Applicant) v. Rapid Forming Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0694-85-R: Christian Labour Association of Canada, (Applicant) v. Geri-Care Nursing Home of Carissant Care Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent at Harriston, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (73 employees in unit).

0819-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Harnden & King Construction Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

Unit #2: "all employees of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and

except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

Unit #3: (See: *Applications for Certification Dismissed - No Vote Conducted*).

1252-85-R: Brewery, Malt and Soft Drink Workers, Local 304, (Applicant) v. Glengarry Glass (1985) Canada Ltd./Les Glasses Glengarry (1985) Canada Ltee, (Respondent).

Unit: "all employees of the respondent in the Town of Alexandria save and except foremen, persons above the rank of foreman, office and clerical staff." (35 employees in unit). (*Having regard to the agreement of the parties*).

1492-85-R: Ontario Public Service Employees Union, (Applicant) v. Morton Youth Services, (Respondent).

Unit: "all employees of the respondent at Barrie, Ontario, save and except office manager, assistant superintendent, persons above the rank of assistant superintendent, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (22 employees in unit).

2104-85-R: United Steelworkers of America, (Applicant) v. ABC Plastic Moulding, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 24 Fleeceline Road, Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, technical and sales staff, and students employed during the school vacation period." (123 employees in unit). (*Having regard to the agreement of the parties*).

2204-85-R: Canadian Union of Public Employees, (Applicant) v. The Toronto General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, registered nursing assistants, paramedical personnel, office and clerical staff, supervisor, foreman and assistant chief engineer." (233 employees in unit). (*Clarity Note*).

2296-85-R: Labourers' International Union of North America - Local 247, (Applicant) v. Coldmatic Refrigeration of Canada Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2440-85-R: Canadian Paperworkers Union, (Applicant) v. Revlon Canada Inc., (Respondent) v. District 65, UAW, Distributive Workers of America and Canada, (Intervener).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office, laboratory and sales staff." (103 employees in unit). (*Having regard to the agreement of the parties*).

2540-85-R: Ontario Public Service Employees Union, (Applicant) v. Kenora-Keewatin District Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in the Town of Kenora, save and except Behavioral Consultants I, Behavioral Consultants II, supervisors, persons above the rank of supervisor, adult protective service worker, volunteer co-ordinator, secretary to the executive director, secretary to the personnel officer/controller, administrative secretary, students employed during the school vacation periods and persons regularly employed for not more than twenty-four hours per week." (38 employees in unit).

2585-85-R: Employees' Association St. Mary's of the Lake Hospital, (Applicant) v. St. Mary's of the Lake Hospital, (Respondent).

Unit: "all registered and graduate nurses of the respondent in Kingston, Ontario, employed in a nursing capacity, regularly employed for not more than twenty-four (24) hours per week, save and except the Sisters, Head Nurses and those above the rank of Head Nurse." (18 employees in unit).

2635-85-R: Labourers' International Union of North America Local 183, (Applicant) v. 632016 Ontario Limited, (Respondent).

Unit: "all employees of 632016 Ontario Limited engaged in concrete forming on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (28 employees in unit).

2668-85-R: Christian Labour Association of Canada, (Applicant) v. H.C.H. Nursing Homes Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of H.C.H. Nursing Homes Inc. in Brampton, save and except supervisors, persons above the rank of supervisors and office staff." (86 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2724-85-R: United Food & Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. The Corporation of the Town of Leamington, (Respondent).

Unit: "all employees of the respondent at the Frank T. Sherk Recreation Complex in the Town of Leamington, save and except supervisors, persons above the rank of the supervisor, and persons regularly employed for not more than twenty-four hours per week." (87 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2728-85-R: Labourers' International Union of North America, Local 625, (Applicant) v. 407689 Ontario Limited carrying on business as Chatham Concrete Forming, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

2762-85-R: United Food and Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. Faculty Club of McMaster University, (Respondent).

Unit #1: "all employees of the respondent in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than twenty-four hours per week." (22 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent in the City of Hamilton regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (22 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2790-85-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Custom Pharmaceuticals Ltd., (Respondent).

Unit: "all employees of the respondent in the Town of Fort Erie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, laboratory personnel, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (62 employees in unit). (*Having regard to the agreement of the parties*).

2797-85-R: Energy and Chemical Workers Union, (Applicant) v. Pharmapak Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff." (97 employees in unit).

2875-85-R: Labourers' International Union of North America, Local 1036, (Applicant) v. Burnac Corporation, (Respondent).

Unit #1: "all employees of the respondent in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the City of Sault Ste. Marie regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

2876-85-R: Ontario Public Service Employees Union, (Applicant) v. Beaver Foods Ltd., (Respondent).

Unit: "all employees of the respondent in its Encare Division at Huron College, London, save and except supervisors and persons above the rank of supervisor." (23 employees in unit). (*Having regard to the agreement of the parties*).

2896-85-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Clifford Panel Systems Ltd., (Respondent).

Unit: "all employees of the respondent at and out of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

2919-85-R: Ontario Public Service Employees Union, (Applicant) v. Participation Lodge-Grey Bruce, (Respondent).

Unit #1: "all employees of the Respondent in Holland Township save and except supervisors, persons above the rank of supervisor, professional medical staff, physiotherapists, confidential secretary to the administrator, persons employed under a co-operative or governmental training program, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Holland Township, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, physiotherapists, confidential secretary to the administrator, and persons employed under a co-operative or governmental training program." (8 employees in unit). (*Having regard to the agreement of the parties*).

2920-85-R: London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Durham Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Durham, Ontario, save and except department heads, persons above the rank of department head, professional medical staff, registered and graduate nurses, undergraduate nurses, graduate and undergraduate pharmacists, graduate and undergraduate dietitians, "paramedical" personnel, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2921-85-R: London and District Service Workers' Union, Local 220, (Applicant) v. Durham Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Durham, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, professional medical staff, registered and graduate nurses, undergraduate nurses, graduate and undergraduate pharmacists, graduate and undergraduate dietitians, 'paramedical' personnel and office and clerical staff." (11 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2937-85-R: Ontario Public Service Employees Union, (Applicant) v. Sudbury Memorial Hospital, (Respondent).

Unit: "all office, clerical and technical employees of the respondent at Sudbury, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, supervisors and foremen, persons above the rank of supervisor and foreman, secretary to the Administrator, secretary to the Assistant Administrator, secretary to the Director of Nursing, secretary to the Assistant Director of Nursing, payroll officer, accountant, secretary to the Director of Financial Services, and persons for whom any trade union held bargaining rights as of February 28, 1986, the date of Application." (39 employees in unit). (*Having regard to the agreement of the parties*).

2938-85-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Cambridge Labour Code, (Respondent).

Unit: "all employees of the respondent in Cambridge, save and except supervisors, persons above the rank of supervisor and office staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

2968-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. M. Cazabon Ltd. c.o.b. Cazabon I.G.A., (Respondent).

Unit: "all employees of the respondent at Massey, save and except grocery manager, persons above the rank of grocery manager and office staff." (18 employees in unit). (*Having regard to the agreement of the parties*).

2974-85-R: Bakery Confectionery & Tobacco Workers' International Union, Local 264, (Applicant) v. Central Bakery of Toronto Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and employees in the bargaining units for which any trade union held bargaining rights as of March 5, 1986." (89 employees in unit). (*Having regard to the agreement of the parties*).

2979-85-R: United Food and Commercial Workers International Union, (Applicant) v. Dollo Bros. Food Market Limited, (Respondent).

Unit: "all employees of the respondent in the Township of Anson, Hindon and Minden regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except store manager, persons above the rank of store manager, produce manager and bookkeeper." (10 employees in unit). (*Having regard to the agreement of the parties*).

2989-85-R: Independent Canadian Steelworkers Union, (Applicant) v. VS Services Ltd., (Respondent).

Unit: "all employees of the respondent at Niagara College, Welland, Ontario regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

2993-85-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Aluminum Mold & Pattern Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Weston, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (42 employees in unit).

2998-85-R: Service Employees Union, Local 478, (Applicant) v. St. Joseph's General Hospital of North Bay Inc., (Respondent).

Unit: "all office and clerical employees of the respondent at North Bay regularly employed for not more than twenty-two and one half hours per week (22 1/2) and students employed during the school vacation period, save and except technical personnel, secretary to the administrator, secretary to the assistant administrator, secretary to the director of nursing, secretary to the director of Human Resources, supervisors and persons above the rank of supervisor and any employees in bargaining units for which any trade union held bargaining rights as of March 5, 1986 being the application date." (29 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3008-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Crown Plumbing Ltd., (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in unit).

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit).

3018-85-R: Amalgamated Transit Union, Local 279, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener).

Unit: “all employees of the respondent in its Para Transport Division in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and employees in bargaining units for whom any trade union held bargaining rights as of March 6th, 1986.” (58 employees in unit). (*Having regard to the agreement of the parties*).

3027-85-R: Canadian Union of Public Employees, (Applicant) v. Geraldton District Hospital Inc., (Respondent).

Unit #1: “all employees of the respondent in the Town of Geraldton, save and except professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff, supervisors, persons above the rank of supervisor, security guards, students employed in a cooperative work study programme, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (59 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent in the Town of Geraldton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff, supervisors, persons above the rank of supervisor, security guards, employees in a cooperative work study programme.” (59 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3030-85-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Dutch Laundry and Dry Cleaners Limited carrying on business as Forest City Linen Supply, (Respondent).

Unit: “all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (78 employees in unit). (*Having regard to the agreement of the parties*).

3035-85-R: International Brotherhood of Electrical Workers Local Union 804, (Applicant) v. Walmarc Electric Limited, (Respondent).

Unit #1: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

Unit #2: “all electricians and electricians’ apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

3036-85-R: International Brotherhood of Electrical Workers Local Union 120, (Applicant) v. Gordon Ruth & Company Limited, (Respondent).

Unit: "all employees of the Respondent in the city of London and the counties of Oxford, Huron, Middlesex and Elgin, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of March 10, 1986." (2 employees in unit). (*Having regard to the agreement of the parties*).

3037-85-R: United Steelworkers of America, (Applicant) v. Chief Industries Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Chief Industries Inc. in the Town of Valley East, save and except foremen and persons above the rank of foreman, office, clerical, technical and sales staff and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

3038-85-R: United Steelworkers of America, (Applicant) v. Tokheim of Canada Limited, (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen and persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period." (29 employees in unit). (*Having regard to the agreement of the parties*).

3039-85-R: Teamsters Chemical Energy & Allied Workers Union Local 424, (Applicant) v. Resco Chemicals & Colours Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, and persons for whom a trade union held bargaining rights on the date hereof." (12 employees in unit).

3041-85-R: Hotels, Clubs, Restaurants & Taverns Employees Union - Local 261, (Applicant) v. Tan Popo Food Services Ltd., (Respondent).

Unit: "all employees of the respondent at 89 Clarence St., Ottawa, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except general manager, persons above the rank of general manager, dining room manager, kitchen manager and office staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

3044-85-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Gentletouch Dry Cleaning Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

3048-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. P. Aldo & Sons Construction Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town

of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

3049-85-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Rotesco Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all field technicians employed by the respondent at or out of the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor.” (9 employees in unit). (*Having regard to the agreement of the parties*).

3062-85-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Bloomington Construction Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

3071-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. J. Ward Mechanical Ltd., (Respondent).

Unit #1: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

3073-85-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Municipality of Paipoonge, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Municipality of Paipoonge, save and except road superintendent, persons above the rank of road superintendent, office and clerical staff.” (3 employees in unit). (*Having regard to the agreement of the parties*).

3074-85-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Terrace Bay, (Respondent).

Unit: “all employees of the Respondent in the Township of Terrace Bay, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and employees in

bargaining units for which a trade union held bargaining rights as of the date of application, May 12, 1986." (7 employees in unit). (*Having regard to the agreement of the parties*).

3083-85-R: Canadian Union of Public Employees, (Applicant) v. VS Services Ltd., (Respondent).

Unit #1: "all employees of the respondent at St. Vincent de Paul Hospital, Brockville, Ontario, save and except supervisors and persons above the rank of supervisor." (20 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at St. Vincent de Paul Hospital, Brockville, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (20 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3090-85-R: Ontario Nurses' Association, (Applicant) v. St. Raphael's Nursing Homes Limited, (Respondents) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at Durham save and except the Director of Nursing and persons above the rank of Director of Nursing." (4 employees in unit). (*Having regard to the agreement of the parties*).

3093-85-R: The Canadian Union of Public Employees, (Applicant) v. Chedoke-McMaster Hospitals - Chedoke Hospital Division, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all employees of the respondent at its Chedoke Hospital Division at Hamilton, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer, assistant chief engineer, office staff and employees in bargaining units for which any trade union held bargaining rights as of March 17, 1986." (218 employees in unit). (*Having regard to the agreement of the parties*).

3099-85-R: Food and Service Workers of Canada, (Applicant) v. The Children's Book Store Limited, (Respondent).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the store manager, persons above the rank of store manager, librarian consultants, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (22 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the store manager, persons above the rank of store manager and librarian consultants." (22 employees in unit). (*Having regard to the agreement of the parties*).

3100-85-R: United Steelworkers of America, (Applicant) v. Senco Products (Canada) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (25 employees in unit). (*Having regard to the agreement of the parties*).

3105-85-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Pro Insul Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

3121-85-R: Service Employees Union Local 268, (Applicant) v. The Lady Dunn General Hospital, (Respondent).

Unit: “all office and clerical employees of the respondent at Wawa, save and except supervisors, persons above the rank of supervisor, secretary to the Chief Executive Officer, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of March 17, 1986.” (3 employees in unit). (*Having regard to the agreement of the parties*).

3122-85-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Keewatin, (Respondent) v. Teamsters Union, Local 990, (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America Local Union 1669, (Intervener #2) v. Local 559 of the International Brotherhood of Electrical Workers, (Intervener #3).

Unit: “all employees of the respondent in Keewatin, save and except supervisors, persons above the rank of supervisor, confidential secretary to the Town Clerk, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of March 18, 1986.” (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3123-85-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Bay-Tower Homes Company Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

3161-85-R: United Steelworkers of America, (Applicant) v. B.B.A. Automotive and Industrial (Canada) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the town of Bracebridge, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period.” (58 employees in unit). (*Having regard to the agreement of the parties*).

3171-85-R: International Union of Bricklayers and Allied Craftsmen, Local 2 Ontario, (Applicant) v. N.R.J.M. General Contractors Limited, (Respondent).

Unit #1: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

Unit #2: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

3175-85-R: Christian Labour Association of Canada, (Applicant) v. Caressant Care Nursing Home of Canada Limited, (Respondent) v. Group of Employees, (Objector).

Unit: "all employees of the respondent in its nursing home in the Township of East Zora - Tavistock, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3185-85-R: Food and Service Workers of Canada, (Applicant) v. Ashby House Group, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the co-ordinator and persons above the rank of co-ordinator." (10 employees in unit). (*Having regard to the agreement of the parties*).

3201-85-R: United Steelworkers of America, (Applicant) v. NTN Bearing Corporation of Canada Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in unit).

3202-85-R: Energy and Chemical Workers Union, (Applicant) v. Schenectady Chemicals Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales, technical staff, and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

3203-85-R: United Brotherhood of Carpenters & Joiners of America, Local #494, (Applicant) v. Interthon Construction & Management Associates Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0013-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. S. K. Wellman Company of Canada Limited, (Respondent).

Unit: "all employees of the respondent in Concord, save and except foremen, persons above the rank of foreman, office and sales staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

0040-86-R: International Brotherhood of Painters & Allied Trades Local 1824, (Applicant) v. Waterloo Glass and Mirror Ltd., (Respondent).

Unit #1: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all glaziers and glaziers' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

0041-86-R: Labourers' International Union of North America Local 527, (Applicant) v. Ken Scharf Const., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0042-86-R: Labourers' International Union of North America, Local 527, (Applicant) v. Brilok Construction Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0051-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Almico Plastics Limited, (Respondent).

Unit: "all employees of the respondent in Cornwall, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

0080-86-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Alto Plumbing, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0084-86-R: International Union of Bricklayers and Allied Craftsmen, Local 2 Ontario, (Applicant) v. 628983 Ontario Limited c.o.b. as Centro Masonry Ltd., (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0106-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. C & A Grading Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships and Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0702-85-R: Ontario Public School Teachers' Federation, (Applicant) v. Niagara South Board of Education, (Respondent).

Unit: "all occasional teachers employed by the Niagara South Board of Education in its elementary panel, in the Regional Municipality of Niagara, save and except persons in bargaining units for which any trade union held bargaining rights as of June 20, 1985." (249 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	249
Number of persons who cast ballots	173
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	135
Number of ballots marked against applicant	19
Ballots segregated and not counted	18

2893-85-R: Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Metrans (Ontario) Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	30
Number of names of persons who cast ballots	30
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	12

2939-85-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. The Credit Valley Hospital, (Respondent).

Unit: "all stationary engineers and their helpers employed at the powerhouse of the respondent in the Regional Municipality of Peel, save and except chief engineer and persons above the rank of chief engineer." (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Ballots segregated and not counted	1

2940-85-R: International Woodworkers of America, (Applicant) v. Goldcrest Furniture Ltd., (Respondent) v. Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

Unit: "all employees of the respondent in its Furniture Division in Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (272 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voter's list	271
Number of persons who cast ballots	200
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	199
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	37
Number of ballots marked in favour of intervener	156
Ballots segregated and not counted	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0694-85-R: Christian Labour Association of Canada, (Applicant) v. Geri-Care Nursing Home of Carissant Care Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Harriston, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (73 employees in unit).

Number of names of persons on list as originally prepared by employer	31
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	11

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

0865-85-R: Ontario Public Service Employees Union, (Applicant) v. St. Andrew's Centennial Manor, a Division of Swiss Nursing Homes Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its St. Andrew's Centennial Manor Division at Midland, save and except supervisors, those above the rank of supervisor and office staff." (65 employees in unit).

Number of names of persons on revised voters' list		60
Number of persons who cast ballots	54	
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		18

1447-85-R: United Garment Workers of America, (Applicant) v. L. Davis Textiles Co. Limited, (Respondent).

Unit: "all employees of the respondent in Napanee, Ontario, save and except foremen and foreladies, persons above the rank of foreman or forelady, office and sales staff, trainer-supervisors, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in unit).

Number of names of persons on revised voters' list		38
Number of persons who cast ballots	37	
Number of ballots marked in favour of applicant		24
Number of ballots marked against applicant		13

2371-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Benjamin Distribution Ltd., (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent, including dependent contractors, in the Township of Sandwich South, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff." (16 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		6

2486-85-R: The Canadian Union of Public Employees, (Applicant) v. The Doctor J.O. Ruddy General Hospital, (Respondent).

Unit: "all employees of the respondent in Whitby, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, Nurse Managers, persons above the rank of Nurse Manager, Discharge Planner, Co-ordinators, persons employed in paramedical functions, security guards, Supervisors, persons above the rank of Supervisor, office and clerical staff." (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		44
Number of persons who cast ballots	34	
Number of ballots marked in favour of applicant		25
Number of ballots marked against applicant		4
Ballots segregated and not counted		5

2683-85-R: International Woodworkers of America, (Applicant) v. Britannia Woodmoulding Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, those persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		34
Number of persons who cast ballots	31	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	29	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		15
Ballots segregated and not counted		2

2797-85-R: Energy and Chemical Workers Union, (Applicant) v. PharmaPak Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (97 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		76
Number of persons who cast ballots	76	
Number of ballots marked in favour of applicant		44
Number of ballots marked against applicant		32

Bargaining Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

Applications for Certification Dismissed - No Vote Conducted

2270-84-R: Ontario Public Service Employees Union, (Applicant) v. The Pembroke and District Association for the Mentally Retarded, (Respondent). (23 employees in unit).

2271-84-R: Ontario Public Service Employees Union, (Applicant) v. The Pembroke and District Association for the Mentally Retarded, (Respondent). (9 employees in unit).

0486-85-R: Canadian Paperworkers Union, (Applicant) v. Belkin Packaging Ltd., (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener) v. Group of Employees, (Objectors). (25 employees in unit).

1269-85-R: Canadian Paperworkers Union, (Applicant) v. Faber-Castell Canada Limited, (Respondent) v. Group of Employees, (Objectors). (104 employees in unit).

2772-85-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. BASS, A Division of Polycom Systems Limited, (Respondent). (77 employees in unit).

3015-85-R; 3016-85-R: Canadian Union of Public Employees, (Applicant) v. St. Joseph's Hospital and Home, (Respondent). (25 employees in unit).

3017-85-R: Ironworkers District Council of Ontario, (Applicant) v. Aurora Scale Manufacturing Limited, (Respondent). (2 employees in unit).

3065-85-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Lansing Building Supply (Ontario) Limited, (Respondent) v. Group of Employees, (Objectors). (113 employees in unit).

3182-85-R: Ontario Catholic Occasional Teachers' Association, (Applicant) v. The Dufferin-Peel Roman Catholic Separate School Board, (Respondent). (231 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0264-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. The Board of Education for the City of York, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all occasional teachers employed by the respondent in its secondary panel in the City of York, save and except persons covered by subsisting collective agreements." (194 employees in unit).

Number of names of persons on list as originally prepared by employer	306
Number of persons who cast ballots	81
Number of segregated ballots cast by persons whose name appear on voters' list	77
Number of segregated ballots cast by persons whose names do not appear on voters' list	4

2634-85-R: Ontario Public Service Employees Union, (Applicant) v. The Board of Education for the City of Toronto, (Respondent) v. Toronto Educational Assistants' Association, (Intervener).

Unit: "all educational assistants employed by the respondent in the City of Toronto save and except supervisors, persons above the rank of supervisor, persons employed as educational assistants for not more than twenty-four (24) hours per week and persons employed as educational assistants for a definite term or task." (565 employees in unit).

Number of names of persons on revised voters' list	567
Number of persons who cast ballots	518
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	517
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	150
Number of ballots marked in favour of intervener	365
Ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0409-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. The Commonwealth Holiday Inns of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at the Holiday Inn London City Centre Tower, and Briarwood Inn, at 299 and 300 King Street, London, save and except supervisors, persons above the rank of supervisor, office and sales staff, security staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (184 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	7

1366-85-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Honest Ed's, (Respondent).

Unit: "all employees of the respondent at its retail store in Metropolitan Toronto, save and except department managers (buyers), persons above the rank of department manager (buyer), office and clerical staff, pharmacists, sign shop employees, security staff and students employed during the summer vacation period." (307 employees in unit).

Number of names of persons on revised voters' list		305
Number of persons who cast ballots	268	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		85
Number of ballots marked against applicant		141
Ballots segregated and not counted		40

1430-85-R: Sudbury Mine Mill & Smelter Workers Local 598, (Applicant) v. Northway Metal Fabricators Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Sudbury, save and except supervisors, those persons above the rank of supervisor and office staff." (43 employees in unit).

Number of names of persons revised voters' list		33
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		29

1761-85-R: United Steelworkers of America, (Applicant) v. J.T.L. Machine Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Port Colborne, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, technical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (45 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		38
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		22
Ballots segregated and not counted		2

2693-85-R: Association of Independent Electrical Workers, (Applicant) v. 618830 Ontario Limited, c.o.b. as R.L.D. Electric, (Respondent) v. International Brotherhood of Electrical Workers, Local 353, (Intervener).

Unit: "all electricians and electricians' apprentices in the employ of 618830 Ontario Limited, c.o.b. as R.L.D. Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	23	
Number of ballots marked in favour of International Brotherhood of Electrical Workers, Local 353		12
Number of ballots marked in favour of Association of Independent Electrical Workers		11
Number of ballots marked in favour of No Trade Union		0

2727-85-R: Retail, Wholesale and Department Store Union, (Applicant) v. Jessel Foods Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Kapuskasing, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except branch manager, foreman, salesmen, and office staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2

2788-85-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. P K Welding and Fabricators Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Oshawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (27 employees in unit).

Number of names of persons on list as originally prepared by employer	27
Number of persons who cast ballots	26
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	17

2955-85-R: Laundry and Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Benny Stark Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except assistant general manager, persons above the rank of assistant of assistant general manager, bookkeeper, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (33 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	29
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	17

APPLICATIONS FOR CERTIFICATION WITHDRAWN

3047-84-R: United Brotherhood of Carpenters & Joiners of America, Local 494, (Applicant) v. R.D.C. Construction Limited, Relax Development Corporation Limited, Relbridge Construction Inc., (Respondent).

0424-85-R: Union of Canadian U.A.W. Staff Representatives, (Applicant) v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America (U.A.W.), (Respondent).

2789-85-R: Labourers' International Union of North America, and Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089, (Applicant) v. Hulst-Town Cont., (Respondent).

2963-85-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Henry Heskin c.o.b. as Heskin Electric, (Respondent).

2964-85-R: International Brotherhood of Electrical Workers Local 353, (Applicant) v. Natan Shver c.o.b. as Shver Electric, (Respondent).

3001-85-R: United Food and Commercial Workers International Union, (Applicant) v. ABC Electro Powder Coating Limited, (Respondent).

3040-85-R: Hotels, Clubs, Restaurants & Taverns Employees' Union - Local 261, (Applicant) v. Cafe Bohemian, (Respondent).

3070-85-R: Ironworkers District Council of Ontario, (Applicant) v. The Roxson Contractors Limited, (Respondent).

3072-85-R: United Brotherhood of Carpenters & Joiners of America, Local #494, (Applicant) v. Interthon Construction and Management Associates Ltd., (Respondent).

3142-85-R: Employees' Association St. Mary's of the Lake Hospital (Service Group), (Applicant) v. St. Mary's of the Lake Hospital, (Respondent).

3174-85-R: International Brotherhood of Painters and Allied Trades - Local Union 557, (Applicant) v. Universal Wallcoverings Ltd., (Respondent).

0003-86-R: Inter-Provincial Brotherhood of Electrical Workers Fraternite Inter-Provinciale des Ouvriers and Electricite, (Applicant) v. Modern Building Cleaning, a division of Dustbane Enterprises Limited, (Respondent).

0007-86-R: United Steelworkers of America, (Applicant) v. Teck-Corona Operating Corporation, (Respondent).

0008-86-R: United Steelworkers of America, (Applicant) v. Litton Canada Inc. Butterfield/Dominion Twist Drill Division, (Respondent).

0096-86-R: Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Christie Park Nursing Homes Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0622-85-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. William S. Burnside (Canada) Limited and Cote & Ryde Construction Ltd., (Respondents). (*Withdrawn*).

1711-85-R: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Transway Construction Ltd., Mac-Bar Construction Ltd., and McBar Marketing Co. Limited, (Respondent). (*Withdrawn*).

2520-85-R: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. R. W. MacPhail Drywall Limited Anmak Contracting Limited, (Respondents). (*Granted*).

2664-85-R: International Union of Operating Engineers, Local 793, (Applicant) v. Environmental Technical Services Inc., Landmark Contracting Ltd., (Respondent). (*Withdrawn*).

2759-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Guthrie Canadian Investments Limited, Modular Process Systems Limited, (Respondent). (*Granted*).

2838-85-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Environmental Technical Services Inc., Landmark Contracting Ltd., (Respondents). (*Withdrawn*).

2971-85-R: Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Servais Sheet Metal Ltd. and Kool-Temp Air Conditioning, Refrigeration and Heating Ltd. and Service Sheet Metal, (Respondents). (*Dismissed*).

3179-85-R: Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited, (Applicants) v. Teamsters Chemical Energy and Allied Workers Union, Local 424, (Respondent). (*Granted*).

SALE OF A BUSINESS

0623-85-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. William S. Burnside (Canada) Limited and Cote & Ryde Construction Ltd., (Respondents). (*Withdrawn*).

1712-85-R: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Transway Construction Ltd., Mac-Bar Construction Ltd., and McBar Marketing Co. Limited, (Respondent). (*Withdrawn*).

2520-85-R: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. R. W. MacPhail Drywall Limited Anmak Contracting Limited, (Respondents). (*Granted*).

2684-85-R: United Food and Commercial Workers International Union, Local 175 and 633, (Applicants) v. New Dominion Stores Inc., The Great Atlantic & Pacific Company of Canada Limited, (Respondents) v. United Food and Commercial Workers, Local 206, (Intervener #1) v. United Steelworkers of America, (Intervener #2). (*Granted*).

2758-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Guthrie Canadian Investments Limited, Modular Process Systems Limited, (Respondent). (*Granted*).

2834-85-R: International Brotherhood of Painters and Allied Trades, Local 1494, (Applicant) v. National Painting & Decorating Corporation Encore Painting Ltd., (Respondents). (*Withdrawn*).

2839-85-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Environmental Technical Services Inc., Landmark Contracting Ltd., (Respondents). (*Withdrawn*).

2925-85-R: United Steelworkers of America, (Applicant) v. Dominion Stores Limited and New Dominion Inc., (Respondents) v. The Great Atlantic & Pacific Company of Canada Limited, (Intervener). (*Withdrawn*).

2972-85-R: Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Servais Sheet Metal Ltd. and Kool-Temp Air Conditioning, Refrigeration and Heating Ltd. and Service Sheet Metal, (Respondents). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1396-85-R: Margaret Glass, (Applicant) v. United Food & Commercial Workers International Union, (Respondent) v. Empress Foods Ltd., (Intervener). (1 employee in unit). (*Granted*).

1397-85-R: Henry Slingerland, (Applicant) v. United Food & Commercial Workers International Union, (Respondent) v. Empress Foods Ltd., (Intervener). (2 employees in unit). (*Granted*).

2443-85-R: Maria Roas Gouveia, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. York Condominium Corporation #146 by 175 Property Manager, Abode Properties Limited, (Employer).

Unit: "all employees in the bargaining unit engaged in cleaning and maintenance at 20 Edgecliffe Golf-way, Don Mills, Ontario, including resident superintendents, save and except property manager office and clerical staff." (3 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		3

2717-85-R: Tim MacDonnell, (Applicant) v. Labourers' International Union of North America, Local 527, (Respondent) v. Fiberez Corrosion Molding Products Ltd., (Intervener).

Unit: "all employees of the respondent working at its Saunders Drive plant in Cornwall, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (14 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		14

2924-85-R: Wayne H. Culling, (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 785, (Respondent). (13 employees in unit). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1198-82-U: General Workers Union, Local 1030 of the U.B.C. and J. of A., (Complainant) v. Brenning Construction Limited, (Respondent). (*Dismissed*).

0283-84-U: Maurice Berlinguette, (Complainant) v. Labourer's International Union of North America, Local 1036, (Respondent). (*Withdrawn*).

1749-84-U: Ontario Public Service Employees Union, (Complainant) v. The Pembroke and District Association for the Mentally Retarded, (Respondent). (*Dismissed*).

2400-84-U: Civic Institute of Professional Personnel, (Complainant) v. The Corporation of the City of Ottawa, (Respondent). (*Dismissed*).

3168-84-U: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Rapid Forming Inc., (Respondent). (*Withdrawn*).

3169-84-U: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. R.D.C. Construction Limited, Relax Development Corporation Limited, Relbridge Construction Inc., Karl Fritz, (Respondent). (*Withdrawn*).

3344-84-U: C.U.B.S.M. Local 681, (Complainant) v. C.N.I.B., (Respondent). (*Withdrawn*).

0410-85-U: Ontario Nurses' Association, (Complainant) v. Metropolitan General Hospital (Windsor), (Respondent). (*Withdrawn*).

0599-85-U: Nick Barbieri, John Cabral, John Cardoso, Mike Mihajlovic and Carmen Principato, (Complainants) v. Michele Gargaro, Arthur E. Coia, Angela Fosco, Ugo Rossini and Labourer's International Union of North America and Local 506 of the Labourer's International Union of North America, (Respondents). (*Withdrawn*).

0885-85-U: Retail, Wholesale and Department Store Union, (Complainant) v. T. Eaton Co. Ltd. (Scarborough Town Centre), (Respondent). (*Withdrawn*).

0886-85-U: Retail, Wholesale and Department Store Union, (Complainant) v. T. Eaton Co. Ltd. (St. Catharines), (Respondent). (*Withdrawn*).

0934-85-U; 0954-85-U: United Food & Commercial Workers International Union AFL-CIO-CLC Local 1230, (Complainant) v. ABC Electro Powdercoating Limited, (Respondent). (*Withdrawn*).

1078-85-U: Greater Northern Ontario Trucking Association, (Complainant) v. Alexander Centre Industries Limited, (Respondent). (*Withdrawn*).

1086-85-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainants) v. Holiday Inn London City Centre and Tower, and Brianwood Inn of the Commonwealth Holiday Inns of Canada Limited, (Respondent). (*Withdrawn*).

1293-85-U: United Brotherhood of Carpenters and Joiners of America, Local 3054 and Frank Stilson, (Complainant) v. Robert Hunt Corporation, (Respondent). (*Granted*).

1089-85-U: RCP Inc., (Complainant) v. Labourers' International Union of North America, Local 1267 and William Mezureux, (Respondents). (*Withdrawn*).

1357-85-U: Jeanette Kirkpatrick, (Complainant) v. The Corporation of the Town of Oakville and The Canadian Union of Public employees, Local 1329, (Respondents). (*Dismissed*).

1444-85-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Honest Ed's Limited, (Respondent). (*Withdrawn*).

1451-85-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC:, (Complainant) v. Simpsons Limited, (Respondent). (*Withdrawn*).

1695-85-U: Clive Edwards, (Complainant) v. United Steelworkers of America, (Respondent) v. Dominion Bridge - Ontario a unit of AMCA International Limited, (Intervener). (*Dismissed*).

1893-85-U: Ryszard Iwanski, (Complainant) v. International Association of Bridge, Structural and Ornamental Iron Workers, (Respondent). (*Withdrawn*).

1906-85-U: United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

1917-85-U: Office and Professional Employees International Union, Local 523, (Complainant) v. Caisse Populaire de Kapuskasing Limitee, (Respondent). (*Withdrawn*).

2208-85-U: Andrew Smuk, (Complainant) v. International Association of Machinists Local 1740 & Aerospace Workers, (Respondent). (*Granted*).

2378-85-U: United Food and Commercial Workers International Union, Local 1105-P, (Complainant) v. Saville Food Products, Inc., (Respondent). (*Granted*).

2418-85-U: United Food and Commercial Workers International Union, Local 175, (Complainant) v. Thorold I.G.A. Market, (Respondent). (*Withdrawn*).

2470-85-U: United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

2555-85-U: H. Novotny, A. Rattery, K. Weddel, (Complainant) v. Ontario Hydro, Pickering Nuclear Generating Station and CUPE Local 1000, (Respondent). (*Withdrawn*).

2567-85-U: Chateau Flight Kitchen (Ron McLaughlin & Glen Hutchinson), (Complainants) v. Hotel Employees Restaurant Employees Union Local #75, (Respondent) v. Chateau Flight Kitchen, CP Hotels, A Division of Canadian Pacific Air Lines, Limited, (Intervener). (*Withdrawn*).

2602-85-U: William Douglas, (Complainant) v. Humber College, (Respondent). (*Dismissed*).

2629-85-U: Brewery, Malt and Soft Drink Workers, Local 304, (Complainant) v. Kwik Lok Ltd., (Respondent). (*Withdrawn*).

2648-85-U: United Steelworkers of America, (Complainant) v. Thor Industries Canada Ltd., (Respondent). (*Withdrawn*).

2657-85-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. The Pastry Place Limited, (Respondent). (*Withdrawn*).

2661-85-U: Ontario Sheet Metal and Air Handling Group, (Complainant) v. Ken Roloson, (Respondent). (*Withdrawn*).

2663-85-U: Southern Ontario Newspaper Guild (C.L.C.-A.F.L.-C.I.O.), (Complainant) v. The Hamilton Spectator, (Respondent). (*Withdrawn*).

2680-85-U: Victor St. Pierre, (Complainant) v. The United Steelworkers of America AFL-CIO-CLC, 5417, (Respondent). (*Dismissed*).

2698-85-U: Terry Hayward, (Complainant) v. Jerry Martin Jr. President Local 25 (Energy and Chemical Workers Union), (Respondent) v. Jerry Wayne Martin, (Intervener #1) v. (BASF) Inmont Canada Inc., (Intervener #2) v. Energy and Chemical Workers Union, (Intervener #3). (*Withdrawn*).

2700-85-U: Labourers' International Union of North America, Local 183, (Complainant) v. Olympia & York Developments Limited, c.o.b. as Olympia Floor & Wall Tile Company and Joe Schochet, (Respondents). (*Withdrawn*).

2705-85-U: Terry Hayward, (Complainant) v. John L. Sullivan and (BASF) Inmont Canada Inc., (Respondents) v. Energy and Chemical Workers Union, (Intervener). (*Withdrawn*).

2707-85-U: Philip Flynn, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 46, and Brown Boveri Howden Inc., (Respondents). (*Dismissed*).

2731-85-U: Canadian Union of Public Employees, (Complainant) v. Medi Park Lodges Inc. - Valleyport Lodge, (Respondent). (*Withdrawn*).

2732-85-U: Labourers International Union of North America, Local 493, (Complainant) v. Ferlanti Management Inc., (Respondent). (*Granted*).

2735-85-U: International Brotherhood of Electrical Workers' Local 105, (Complainant) v. Morell Electric Ltd., (Respondent). (*Withdrawn*).

2750-85-U: Zohra S. Subedar, (Complainant) v. Consumers Distributing and Teamsters Local Union No. 419, (Respondents). (*Withdrawn*).

2753-85-U: United Food & Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. ABC Electro Powdercoating Limited, (Respondent). (*Withdrawn*).

2756-85-U: Ontario Nurses' Association, (Complainant) v. Victorian Order of Nurses, Sudbury Branch, (Respondent). (*Withdrawn*).

2767-85-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainants) v. 426979 Ontario Limited (carrying on a business as Espanola I.G.A.), (Respondent). (*Withdrawn*).

2792-85-U: Canadian Union of Public Employees, (Complainant) v. Medi Park Lodges Inc. - Valleyport Lodge, (Respondent). (*Withdrawn*).

2803-85-U: United Electrical, Radio and Machine Workers of Canada (UE), (Complainant) v. GTE Sylvania Canada Limited, Sylvania Lighting Services Division, (Respondent). (*Withdrawn*).

2815-85-U: Trend Millwork & Cabinets Limited with Ontario Cabinet Makers Limited, (Complainant) v. United Brotherhood of Carpenters and Joiners of America-Millworkers Union Local 802, (Respondent). (*Withdrawn*).

2822-85-U: Cleveland Dixon, (Complainant) v. Division 113, (Respondent). (*Withdrawn*).

2842-85-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Blue Line Taxi Company Limited, (Respondent). (*Withdrawn*).

2843-85-U: Labourers' International Union of North America, Ontario Provincial District Council, (Complainant) v. Hulst-Town Cont., (Respondent). (*Withdrawn*).

2846-85-U: Richard G. Sisson, (Complainant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. B173, (Respondent). (*Withdrawn*).

2850-85-U: Food and Service Workers of Canada, (Complainant) v. Windsor Arms Hotel Limited, (Respondent). (*Withdrawn*).

2865-85-U: Powerhouse Shift Engineers, (Complainant) v. United Steelworkers Local 7879 District 6, (Respondent). (*Withdrawn*).

2871-85-U: Aluminum, Brick and Glass Workers International Union, Windsor Local 236, (Complainant) v. Windsor Ceramic Tile Ltd., (Respondent). (*Withdrawn*).

2905-85-U: Canute Adalbert Brisset, (Complainant) v. Connie Steels Inc., International Association of Bridge Structural and Ornamental Iron Worker (Local 834), (Respondents). (*Withdrawn*).

2927-85-U: Everette Chapelle, (Complainant) v. Amalgamated Transit Union, Local 113, (Respondent). (*Withdrawn*).

2930-85-U: Millworkers Local Union 802 - United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Trend Millwork and Cabinets Limited with Ontario Cabinet Makers Limited, (Respondent). (*Withdrawn*).

2931-85-U: Sheet Metal Workers' International Association, Local 540, (Complainant) v. Plasticair Manufacturing, A Division of Plasticair Inc., (Respondent). (*Withdrawn*).

2970-85-U: John Gentile, (Complainant) v. United Steelworkers of America Local 9042, (Respondent). (*Withdrawn*).

2999-85-U: United Food & Commercial Workers International Union, (Complainant) v. The Corporation of the Town of Leamington, (Respondent). (*Withdrawn*).

3051-85-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. The Brick Limited, (Respondent). (*Withdrawn*).

3053-85-U: United Food and Commercial Workers International Union, (Complainant) v. Quinte Meat Products Limited, (Respondent). (*Withdrawn*).

3087-85-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Complainant) v. Benjamin Distribution Ltd. operating as Windsor News, (Respondent). (*Withdrawn*).

3079-85-U: Benny Stark Ltd., (Complainant) v. Laundry and Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Respondent). (*Withdrawn*).

3107-85-U: Canadian Union of Public Employees Local 6, (Complainant) v. The Corporation of the Town of Rayside-Balfour, (Respondent). (*Withdrawn*).

3113-85-U: The Electrical Power Systems Construction Association and Ontario Hydro, (Complainants) v. United Brotherhood of Carpenters and Joiners of America, Local Ontario District Council and The Ontario Allied Construction Trades Council et al, (Respondents). (*Withdrawn*).

3124-85-U: Ernest Pilon, (Complainant) v. Amalgamated Clothing and Textile Workers Union Local 779 A.F.L., C.I.O., C.L.C., (Respondent). (*Withdrawn*).

3155-85-U: Blair Nowe, (Complainant) v. Mr. Harry Anger Steward Schneiders Employee's Association, (Respondent). (*Withdrawn*).

3162-85-U: Ontario Nurses' Association, (Complainant) v. Victorian Order of Nurses (Sudbury Branch), (Respondent). (*Withdrawn*).

3193-85-U: Arlene Ker - Secretary, (Complainant) v. Mr. Bill Ward, President, (Respondent). (*Withdrawn*).

0026-86-U: Jack Canute, (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75, (Respondent). (*Withdrawn*).

0036-86-U: United Food & Commercial Workers International Union, (Complainant) v. Hanna-Dagmar Publications Inc., (Respondent). (*Withdrawn*).

0049-86-U: United Food and Commercial Workers International Union Locals 175 & 633, (Complainant) v. Huntsville IGA, (Respondent).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2658-85-M: Simpson Plant Council, (Applicant) v. A. G. Simpson Company Limited, (Respondent) v. UAW - Canada, (Intervener). (*Granted*).

2783-85-M: Globe Reconditioners, A Division of Canadian Linen Supply Co. Ltd., (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

2891-85-M: Essex Linen Supply, Windsor, Ontario, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

3026-85-M: Strano Foods Limited, (Employer) v. Christian Labour Association of Canada, (Trade Union). (*Granted*).

3098-85-M: Reid Dominion Packaging Limited Brampton Plant, (Employer) v. Graphic Communications' International Union, Local 466, (Trade Union). (*Granted*).

0070-86-M: Canada Cordage Inc., (Employer) v. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC, Local 454, (Trade Union). (*Granted*).

TRUSTEESHIP

T-138-85: Labourer's International Union of North America, (Applicant) v. Labourer's International Union of North America, Local 506, (Respondent) v. Nick Barbieri, John Cabral, John Cardoso, Mike Mihajlovic and Carmen Principato, (Interveners) v. Michele Gargaro, (Intervener). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2348-85-M: Lennox & Addington County General Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Dismissed*).

2643-85-M: Laurier Manor/Ottawa, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2926-85-OH: William Charles Crumb, (Complainant) v. Weber Deliver, (Respondent). (*Withdrawn*).

2697-85-OH: Terry Hayward, (Complainant) v. John L. Sullivan and (BASF) Inmont Canada Inc., (Respondents). (*Withdrawn*).

3076-85-OH: William Lacey, (Complainant) v. Ethyl Canada Inc., (Respondent). (*Withdrawn*).

3080-85-OH: Gaetan Shank, (Complainant) v. Ray Leblanc and Henry German (Supervisors for Falconbridge), (Respondents). (*Withdrawn*).

3111-85-OH: John West, U.A.W. Local 195 Health & Safety Rep. Kendan Mfg. 700 Division Rd. Windsor, Ontario, (Complainant) v. Chuck Cunningham on behalf of Kendan Mfg., (Respondent). (*Withdrawn*).

3178-85-OH: Don Gray, Utility Relief and Repair Operator Axle line. Seniority date - Oct. 28, 1974. General Motors, Scarborough Van Plant, (Complainant) v. Lou D'Angelo, Supervisor of General Motors of Canada Ltd. Scarborough, Ont., (Respondent). (*Withdrawn*).

0027-86-OH: Mark Douglas Dill, (Complainant) v. Dutch Laundry & Dry Cleaners Ltd. Forest City Linen Supply, (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

2603-85-U: Ontario Public Service Employees Union, (Complainant) v. Cambrian College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

2268-84-M: Local #10 of the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, (Applicant) v. Camsyl Insulation Inc., (Respondent). (*Granted*).

0117-85-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 Canada, (Applicant) v. George & Asmussen Ltd., (Respondent). (*Granted*).

0624-85-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. William S. Burnside (Canada) Limited and Cote & Ryde Construction Ltd., (Respondents). (*Withdrawn*).

1160-85-M: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759, (Applicant) v. Intercity Welding & Fabricating Ltd., (Respondent). (*Withdrawn*).

1483-85-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Transway Construction Ltd., (Respondent). (*Withdrawn*).

1909-85-M: International Union of Operating Engineers, Local 793, (Applicant) v. Bot Construction (Canada) Limited, (Respondent). (*Withdrawn*).

1992-85-M: Sheet Metal Workers International Union, Local 397, (Applicant) v. Combustion Engineering-Superheater Ltd., (Respondent). (*Withdrawn*).

2050-85-M: L.I.U.N.A., Ontario Provincial District Council, (Applicant) v. Banister Pipelines Limited, (Respondent). (*Withdrawn*).

2107-85-M: Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Ellis-Don Limited, (Respondent). (*Dismissed*).

2128-85-M: International Association of Bridge, Structural and Ornamental Ironworkers, (Applicant) v. Ontario Hydro, (Respondent). (*Dismissed*).

2136-85-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Brunswick Drywall (Ontario) Ltd., (Respondent). (*Granted*).

2553-85-M: Labourers' International Union of North America, Local 493, (Applicant) v. Roman Plastering and Acoustical Company, (Respondent). (*Withdrawn*).

2586-85-M: International Union of Elevator Constructors, Local No. 90, (Applicant) v. Armor Elevator S. W. Ontario Co., (Respondent). (*Withdrawn*).

2740-85-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Edilform Ltd., (Respondent). (*Granted*).

2934-85-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Guthrie Canadian Investments Limited, Modular Process Systems Limited, (Respondent). (*Granted*).

2935-85-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, (Applicant) v. Taunton Fabricating Ltd., (Respondent). (*Granted*).

2942-85-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27, (Applicant) v. Mark's General Construction Co., (Respondent). (*Granted*).

2973-85-M: Local 47, Sheet Metal Workers' International Association, (Applicant) v. Servais Sheet Metal Ltd. and Kool-Temp Air Conditioning, Refrigeration and Heating Ltd. and Service Sheet Metal, (Respondents). (*Granted*).

2990-85-M: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Kite Painting Company Limited, (Respondent). (*Granted*).

3000-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Mo-Ca Drain and Concrete Ltd., (Respondent). (*Granted*).

3025-85-M: Labourers' International Union of North America, Local 1089, (Applicant) v. Teperman and Sons Inc., (Respondent). (*Granted*).

3029-85-M: United Brotherhood of Carpenters and Joiners of America, Local 446, (Applicant) v. Pioneer Contracting, (Respondent). (*Withdrawn*).

3055-85-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Tessier Partitions, (Respondent). (*Granted*).

3058-85-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Turkeski Construction, (Respondent). (*Withdrawn*).

3059-85-M: Operative Plasterers' and Cement Masons' International Association of United States and Canada, Local 598, (Applicant) v. Yorkview Concrete Finishing Ltd., (Respondent). (*Granted*).

3063-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Dangro Construction Services Ltd., (Respondent). (*Withdrawn*).

3069-85-M: Labourers' International Union of North America Local 183, (Applicant) v. Heart Construction Co. and Residential Farming Contractors Association of Metropolitan Toronto and Vicinity In, (Respondent). (*Withdrawn*).

3103-85-M: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Dry-coustic Construction Limited, (Respondent). (*Granted*).

3104-85-M: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. 572062 Ontario Inc. c.o.b. as Triple Four Interior Systems, (Respondent). (*Granted*).

3140-85-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Stradiotto Masonry Inc., (Respondent). (*Withdrawn*).

3145-85-M: Labourers International Union of North America, Local 183, (Applicant) v. 401821 Ontario Limited c.o.b. as Correct Forming Limited, (Respondent). (*Granted*).

3164-85-M: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aykroyd Contracting Limited, (Respondent). (*Granted*).

3168-85-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Co-Fo Concrete Forming Construction Limited, (Respondent). (*Withdrawn*).

3172-85-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Robert Crowe Construction, (Respondent). (*Granted*).

3208-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Metropolitan Toronto Apartment Builders Association and Goldlist Construction Ltd., (Respondent). (*Withdrawn*).

3209-85-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508, (Applicant) v. Comstock International Ltd./Constructors Northern Ontario Division, (Respondent). (*Withdrawn*).

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*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

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ONTARIO LABOUR RELATIONS BOARD REPORTS

June 1986



Ontario

NOTICE OF NEW PRACTICE NOTE

PRACTICE NOTE NO. 19

June 6, 1986

SETTLEMENT OF FIRST COLLECTIVE AGREEMENT

BY THE BOARD

1. A notice to the Board that parties have agreed that the Board arbitrate the settlement of a first collective agreement must be in writing and must include the following:

- (a) the full name of the trade union and of the employer;
- (b) the address and telephone number of the trade union and of the employer for purposes of service; and
- (c) a copy of the Board decision directing that a first collective agreement between the trade union and the employer be settled by arbitration.

2. Upon receiving a notice which conforms with paragraph 1, the Registrar will schedule the hearing date or dates and give written notice to the parties of such hearing date or dates.

3. Each party must file with the Board no later than nine days from the date on which the notice under paragraph 1 was filed with the Board:

- (a) a proposed collective agreement that it is prepared to execute;
- (b) a list of all those bargaining matters agreed to in writing by the parties and copies of such agreements and a list of all those bargaining matters which remain in dispute; and
- (c) all of the information, documentation and submissions that it relies on in support of each bargaining matter which remains in dispute.

4. Copies of all of the material filed with the Board pursuant to paragraph 3 must be delivered by each party to the other, on or before the date on which the material is filed with the Board.

5. Each party must forthwith file with the Board a duly completed certificate of delivery in the following form:

CERTIFICATE OF DELIVERY

I hereby certify that copies of all of the material filed with the Board pursuant to paragraph 3 of Practice Note 19 have been delivered to (*Trade Union or Employer*) as follows on the _____ day of _____, 19____:

Name and Title of officer, official or agent to whom it was delivered _____.

Address at which it was delivered _____.

Name: _____

Title: _____

Signature: _____

6. Upon delivery to it of the material from the other party pursuant to paragraph 4, each party must file with the Board and deliver to the other party within six days a detailed written reply to the other party's position on each of the bargaining matters remaining in dispute.

7. Except with leave of the Board, a party will not be permitted to adduce any evidence or make any submissions at the hearing with respect to any matter that was not disclosed in the written material it filed pursuant to paragraphs 3 and 4 or in its reply filed pursuant to paragraph 6.

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UNION, LOCAL 542M; RE GROUP OF EMPLOYEES

821

1941-84-R Labourers' International Union of North America, Local 183, Applicant, v. Dominion Paving Limited, Respondent

Membership Evidence - Picket line not having any unlawful consequences - Whether coerced employees into signing union cards - Whether cards vitiated - Subjective intentions of employees not considered in assessing voluntariness of membership evidence - Economic coercion not relevant - Confidentiality in s.111 preventing employer from calling employees to testify

BEFORE: *D. E. Franks*, Vice-Chairman, and Board Members *J. Wilson* and *R. Wilson*.

APPEARANCES: *S.B.D. Wahl* and *M. O'Brien* for the applicant; *William S. Challis*, *Joseph Racco* and *Frank Belcastro* for the respondent.

DECISION OF THE BOARD; June 3, 1986

1. The name of the respondent is amended to read: "Dominion Paving Limited".
2. The present application for certification was one of two applications for certification made by the applicant Labourers' International Union of North America, Local 183 (hereinafter referred to as "Labourers' Local 183") and the other application for certification was made by the International Union of Operating Engineers, Local 793 (hereinafter referred to as "Operating Engineers, Local 793"). The respondent employer Dominion Paving Limited (hereinafter referred to as "Dominion Paving") made certain charges with respect to the evidence of membership filed in this case and also filed other complaints including a section 89 complaint against both of the trade unions referred to above, amongst others. In a previous decision this panel of the Board declined to consolidate the certification cases with the other complaints. As a consequence the Board heard the evidence concerning the charges in the certification applications.
3. In the present cases, the allegations by the respondent may be summarized as an attack on the voluntariness of the evidence of membership filed by the trade unions in these matters. As a consequence of the conduct of the two unions in the form of a picket line at one of the employer's job sites, the employer maintains that the Board ought not to accept the evidence of membership filed by either trade union.
4. The respondent Dominion Paving Limited is a road building and paving contractor. At the time in question one of its job sites was a project involving the replacing and the repaving of the TTC tracks on Queen Street east of Yonge Street. Essential to the respondent's case in this matter is the work flow on such a project. Since the work is on a public roadway used by both automobile traffic and TTC traffic one of the essential elements of the contract is a minimum of disruption to such traffic. Accordingly, an attempt is made to only disrupt as short a distance along the roadway as possible. The work involves the old pavement being broken up and carted away. The track is replaced, a new road bed is poured, the new track is then shimmed and the finished concrete is poured. In view of the attempt to reduce the effect on the public roadway, the work as is frequently the case in construction, is closely scheduled. Dominion Paving does the break-up of the pavement and the laying of the concrete road bed and then the finished concrete, the tracks are replaced by TTC employees and the tracks are shimmed by TTC employees. It will readily be seen therefore that the work of Dominion Paving Limited employees, both before, during and after the track replacement process is dependent upon work being performed by the TTC employees. We should note, however, that at the time in question this was not the only job that Dominion Paving Limited had nor were all of Dominion Paving's employees employed on this job at that time.

5. The events in question took place on Friday, October 12th, 1984 through to Tuesday, October 16th. Both applications for certification were made on October 18th. There is probably one other piece of background information that is not relevant to the issue at hand, but may partially explain events as they unfolded. Earlier in 1984 the Government of Ontario, when faced with a possible strike by TTC employees passed Bill 125 effectively prohibiting strikes by TTC employees. It is also clear on the evidence that the two unions involved had previously attempted to organize the employees of Dominion Paving and had been unsuccessful in such attempt.

6. On the morning of Friday, October 12th a number of pickets appeared at the Queen Street job site. The evidence of what the sign said is not totally clear. However, as best can be determined the signs said something to the effect that there was "a non-union contractor on this site". In effect, it is clear that a number of representatives of both the trade unions were walking up and down the sidewalk in proximity to the roadway carrying picket signs. From the evidence tendered by the respondent it is clear that the employees of Dominion Paving continued to work on October 12th. That is, the pickets did not prevent the employees of Dominion Paving from performing work on that day or any of the subsequent days during which the picketing took place.

7. With respect to the TTC employees the situation is more complicated. We accept the evidence that the position of the Amalgamated Transit Union Local 113 is that it honours picket lines and further that in the collective agreement between the TTC and that union that the union is entitled to honour such picket lines (although it is not necessary to make such a finding in the present case). The evidence is clear that what happened on the morning of Friday, October 12th was that the TTC employees who were assigned to work on the Queen Street road bed were reassigned by the TTC to work elsewhere. The evidence on this point is clear and undisputed.

8. On Saturday, October 13th the Dominion Paving employees reported to work and again the picket line was there and again the Dominion Paving employees performed their normal work. It is not clear whether the TTC employees were required to work on Saturday. Turning to Monday, October 15th, on that morning the Dominion Paving employees again reported for work. The picket line was there. As on Friday the TTC employees were reassigned to other work. The evidence, however, is that shortly after the start of the work day, the Dominion Paving employees were told to report to Dominion Paving's yard. The evidence of what happened in the yard is sketchy but it is clear that the Dominion Paving employees were paid for that day. It would appear on the evidence that the employees were told by Dominion Paving that if the picket line continued, that there would be no more work for them, largely because of the relationship and the work scheduling between the TTC employees and the work performed by Dominion Paving employees.

9. On Tuesday morning October 16th the Dominion Paving employees reported for work. The picket line was there but it appears that after some delay the picket line was removed, the TTC employees performed their work and the Dominion Paving employees performed their work and there was no further interruption of the job.

10. Two things are clear from the above facts. First, there was no unlawful strike by the Dominion Paving employees. Indeed, it is clear that the conduct of the pickets was not intended to prevent the Dominion Paving employees from continuing with their work. With respect to the TTC employees the matter is slightly more complicated; it is, however, clear that because of the reassignment of the TTC employees by the TTC there was no strike, lawful or unlawful of the TTC employees. It is therefore not necessary for our purposes to decide the question raised by counsel for the applicant that the strike, if there was any, that any such strike would have been lawful conduct in any event. It is trite to say that if an employer does not assign employees to perform certain work, their failure to perform the work does not constitute a strike. In view of these two obvious

conclusions it would appear that the picket line had no unlawful consequences, that is, it cannot be said that the picket line caused an unlawful strike by the Dominion Paving employees or the TTC employees.

11. The argument of the respondent is that the “drying up” of the work as a consequence of the conduct of the TTC and the ATU resulting from the picket line constitutes pressure on the employees of such a nature that the Board ought not to regard any cards signed as a consequence of such pressure as voluntary expressions of the wishes of the employees involved. We would point out that this statement was not one made by either of the unions involved. That is to say there is no evidence that the unions picketing suggested that the Dominion Paving employees would be out of work as a consequence of their picketing. The statement if it occurs, comes from the employer in the form of statements like “if this keeps up we won’t have any work or you won’t have any work”. Further speculation amongst the employees that as long as the pickets were there they would not be working on the job, was not quelled by the employer. Indeed, the work in fact did not dry up as suggested by counsel for the respondent. The work did eventually proceed and it is difficult to see that “the work will dry up” can be a meaningful statement in the present context. The picket line was a temporary disruption which did not lead to the cancellation of Dominion Paving’s contract. Further, had the picket line resulted in an unlawful strike by the TTC employees, that unlawful strike could have been remedied and the work would progress. It is not within the power of the applicant trade unions, whether through a picket line or by any other means, to prevent Dominion Paving and its employees from proceeding with the job, nor as we have noted, did the unions or the pickets make such a claim. Such a claim appears to have arisen primarily in the mind of the employer, who in turn conveyed such concern to the employees, notwithstanding the fact that such a concern was probably inaccurate and could be remedied by the employer.

12. There is one specific aspect of the evidence which we should like to specifically deal with in these reasons and that concerns the evidence tendered by the respondent from certain employees on the Queen Street job site. As noted above, in its earlier decision, the Board characterized the question before it as one concerning the voluntariness of the evidence of membership filed by the applicant trade unions. It is trite to say that the Board, when dealing with voluntariness has accepted an objective standard rather than a subjective standard with respect to determinations of such voluntariness. Thus, the Board is not particularly interested in hearing the concerns of individual employees at the time membership cards were signed or during the membership campaign, but rather on the basis of the objective evidence the Board bases its conclusions on the concerns of a reasonable employee. Nevertheless, counsel for the respondent proceeded to call individual employees to tender evidence concerning the events in question. In total the respondent called four individual employees, three specifically from the job site in question and a fourth who was a working foreman and thus an employee in the bargaining unit.

13. With respect to the three labourers on the job site, Sparaco, Virgilio Travassos and Jose Travassos, the Board having heard their evidence asked counsel for the respondent whether he had other employees to call who would be giving different evidence. Counsel for the respondent indicated that he intended to call all of the employees to give their evidence. At this point, the Board, pursuant to section 111 of the Act refused counsel the permission to call such employees. The employees in question had given evidence concerning the objective facts surrounding the events of October 12th through October 16th. In the course of questioning, however, it was clear that they would be questioned about whether or not they had joined the trade union and the reasons why they had made such a decision. The first matter is privileged by section 111 of the Act, and the second matter is irrelevant. The Board could not and did not allow the respondent employer, by making certain allegations, the right to summon all the employees in the bargaining unit and determine whether or not they had joined the applicant trade union.

14. Indeed, if we turn to the evidence of the three employees, Virgilio Travassos, Jose Travassos and Gino Sparaco, it demonstrates the problems which arise from subjective considerations about evidence of membership and the voluntariness of evidence of membership. Work is assigned on the days in question notwithstanding the picket line. All three were reluctant to talk to any of the trade unions on the picket line "because the foreman was watching". All three signed their membership cards at home. As well, all three were concerned about the effect of the picket line on the job, and whether the picket line would continue and how that would affect their job. They were concerned, but it is difficult to see from their evidence whether or not they concluded that it was actually a threat to their job. Indeed, the notion that it was a threat to their job, as we have noted earlier, seems to come from the employer. Their evidence is simply that they were concerned about it.

15. The distinction between being concerned and threatened is not without some import in this case and in this regard it is interesting to examine the evidence of the other employee in the bargaining unit who was called to give evidence in this case, Mr. Angelucci. Now Mr. Angelucci was a working foreman on salary but nevertheless he is an employee in the bargaining unit (which typically in construction bargaining units includes working foremen.) It is clear from Angelucci's evidence that he did not feel threatened at all. Indeed, he wasn't even concerned by the presence of the picket line. That is, to Angelucci, the picket line constituted no threat to job security, it constituted no threat that the job would "dry up". That, of course, like the view of the other employees is really subjective evidence about the events in question. The point is that such subjective evidence is highly dubious when it comes to dealing with matters of voluntariness. Indeed, the other employees in giving their evidence stated reasons for joining the applicant trade union which were the Board to go into such reasons, would clearly be acceptable reasons for joining and thus voluntary decisions by such employees.

16. We turn now to the question of whether the evidence ought to be regarded as voluntary evidence of membership by the Board using some objective test. It is, however, important to note at the start of such considerations, that picketing is not in and of itself unlawful activity. Picketing is simply an exercise of free speech and as such is a constitutionally guaranteed right of every citizen. In the present case the picketers were walking on the sidewalk not preventing passage or blocking a gate, making their statement. As we have noted earlier, that picketing did not result in any strike whether lawful or unlawful. Further, it would be fallacious to accept that the free speech statement made by such a picket line was purely intended to affect the relations between the TTC and its employees. As we have noted earlier in the evidence, the cards that were signed by the trade union were signed at the homes of the employees. Indeed there was no attempt on the job site to sign up the employees of Dominion Paving nor was there much conversation between the picketers and the employees. What is important about such a picket line is a statement to the employees of Dominion Paving that "we will be attempting to organize the employees of Dominion Paving". The statement made by a picket line is substantially different and more believable than a statement made in the quiet of an employee's home, after working hours, by the union representative that the union is attempting to organize the employees of the employer. Thus, the statement made by the picketing is an important message to the Dominion Paving employees as a group, and such a statement is not, in and of itself unlawful, but is lawful unless otherwise unlawful.

17. Thus, the first question that must be answered when trying to determine the voluntariness of the evidence of membership on an objective basis becomes, was there any unlawful or illegal act involved? In the present case, the answer is clearly no. The picket line which we have noted is in itself lawful conduct did not result in an unlawful strike of either the Dominion Paving employees or the TTC employees. It cannot therefore be said that the picket line although lawful,

resulted in an illegality which pressured the employees into signing union membership cards. Further, it is difficult to see why the Board should say that lawful conduct which doesn't result in unlawful consequences vitiates evidence of membership in a certification case as suggested by counsel for the respondent. Indeed we decline to do so in the present case. There being no unlawful pressure or threat of unlawful pressure exerted on the employees in the present case, we see no reason for not accepting the evidence of membership in this case.

18. We feel constrained, however, to point out that the course of conduct taken by the unions in this matter is indeed a very dangerous one. If such a picket line were to result in an unlawful strike, then that unlawful act may be viewed as exerting unlawful pressure upon the employees and it would be open to the Board to find that such evidence of membership was not acceptable evidence of membership within the meaning of section 1(1)(l) of the Act. Such however is not the case here.

19. There being no unlawful act by the trade union in the present case, can it be said that the picket line results in a coercive effect on the employees? That is, does the picket line have an effect on the employees, such that they are forced into signing membership cards? As we have noted earlier the suggestion that the work was "drying up" was either false or an exaggeration of the circumstances. The employees were not deprived of any pay, they returned to work on the Tuesday and completed the job normally. There is no evidence nor suggestion that the disruption was permanent or that there was a loss of employment or employment opportunities, since the number of job hours required to complete the job was not affected and presumably those employees on the job would be there until the job was completed. In this sense then the picket line cannot be said to have threatened the job security or for that matter the amount of work which would normally be performed by the Dominion Paving employees.

20. The coercive effect of such a picket line, appears to stem from broader notions that the TTC employees will honour picket lines, and that a non-union contractor working alongside unionized employees is subject to such feelings or concerns by the TTC employees that future jobs might be in jeopardy. Such concerns are concerns in the realm of "economic coercion". This Board has specifically rejected considerations of economic coercion in matters relating to recognition of trade unions, see specifically *Traugott Construction* [1982] OLRB Rep. June 958. Indeed, to enter into the economic considerations as to why persons joined trade unions, as part of the considerations of voluntariness, would be, in our view, an impossible, unnecessary, and improper consideration. Trade unions are by their very nature economic entities and the reasons people join trade unions are *a fortiori* economic. To consider economic pressure relating to voluntariness of membership evidence would be to scrutinize whether or not the person joining the trade union had good and proper reasons for joining the trade union. The Board has never engaged in such considerations and it may be said that the intent of the Legislature in passing section 1(1)(l) of the Act which mandates that the Board look at the payment of a dollar and signature in relation to evidence of membership makes this clear. This does not go as far as suggested by counsel for the applicant that the Board cannot look at other matters. However, it is our view that the provision in section 1(1)(l) of the Act clearly removes from the Board dealing with economic considerations for joining a trade union.

21. In sum, how is the Board to objectively look at the effect of such a picket line on the voluntariness of the evidence of representation? In the present case the picket line did not result in any unlawful consequences. Further, the picket line did not threaten the job security or employment opportunities of the employees in question. We can therefore see no reason for rejecting the evidence of representation as suggested by counsel for the respondent. We must, however, again

emphasize that the finding in this case would probably be quite different had there been an unlawful strike of either the Dominion Paving employees or the TTC employees.

22. There remains to consider one other matter that emerged from the evidence in this case. In giving his evidence concerning the events surrounding the signing of the card Mr. Sparaco suggested that the union representative, a Mr. Frank Spera, said that the effect of his signing a card would be a vote. This was denied by Mr. Spera. We are of the view that Mr. Spera's evidence is to be believed over that of Mr. Sparaco. Indeed, we found that Mr. Sparaco's evidence tended to be quite suspect, therefore, we simply do not accept the suggestion that there was a misleading of Mr. Sparaco in this regard.

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[Balance of decision omitted: Editor]

0254-86-R; 0255-86-R; 0256-86-R; 0257-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant, v. **Etna Foods of Windsor Limited**, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. **Kingville Fishermen's Company Ltd.**, Respondent, v. **United Food & Commercial Workers International Union**, Intervener; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. **Lake Erie Foods Inc.**, Respondent, v. **Group of Employees**, Objectors; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. **Northshore Fishery Inc.**, Respondent, v. **Group of Employees**, Objectors

Certification - Trade Union Status - Detailed analysis of steps taken to form a union - Union constitution permitting vessel owners to join union - Trade union need not be composed exclusively of employees - Applicant found to be trade union within meaning of s. 1(1)(p)

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *F. W. Murray* and *D. Patterson*.

APPEARANCES: *L. C. Arnold* and *Domingos Belo* for the applicant; *R. Gary McLister* and *Vito Peralta* for Etna Foods of Windsor Limited; *Patrick F. Milloy* and *Carl Fraser* for Kingsville Fishermen's Company Ltd.; *Rodney M. Godard* for Lake Erie Foods Inc.; *Brian P. Nolan* and *Richard Groh* for Northshore Fishery Inc.; *Frank C. Ricci* for the objectors in File No. 0256-86-R; *Terrence L. Sims* for the objectors in File No. 0257-86-R; *Martin Levinson* and *Kevin Corporan* for the intervener.

DECISION OF THE BOARD; June 18, 1986

1. The name of the respondent in File No. 0255-86-R is amended to read: "Kingsville Fishermen's Company Ltd.", and the name of the respondent in File No. 0257-86-R is amended to read: "Northshore Fishery Inc.".

2. These four applications for certification were filed by the applicant on April 25, 1986 and came on for hearing before this panel of this Board on May 16, 1986. At the commencement of the hearing, counsel for the United Food and Commercial Workers International Union advised the Board that his client wished to withdraw its intervention in respect of File No. 0256-86-R. The style of cause in that matter has been amended accordingly.

3. The applicant has not previously been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. On the agreement of the parties, all of the parties to these four applications were afforded an opportunity to present evidence and argument on the threshold question of whether or not the applicant is a trade union within the meaning of the Act. The sole witness called to testify before the Board concerning that issue was Joe Gandaio.

4. Mr. Gandaio attended at the office of applicant's counsel, L. C. Arnold, in Toronto on the morning of April 21, 1986, together with Carlos Castro, Domingos Belo, and John Radosevic. Messrs. Gandaio, Castro, and Belo were members of a committee comprised of various fishermen, fish processing plant employees, and other persons interested in forming a union. Mr. Radosevic was (and is) an organizer for the United Fishermen and Allied Workers' Union ("U.F.A.W.U."). He came to southern Ontario from British Columbia to assist Messrs. Gandaio, Castro, Belo, and the other members of the committee in their efforts to form a union. While at Mr. Arnold's office, Mr. Radosevic prepared a draft constitution for them by taking a copy of the U.F.A.W.U. constitution and making various deletions, additions, and other amendments to it. The draft constitution produced by Mr. Radosevic took the form of various typeset passages stapled onto lined sheets of paper, with portions struck out and different words written (or printed) above some of the deletions. For example, Article 1.01 in its original typeset form read: "This Organization shall be known as the United Fishermen and Allied Workers' Union." However, in the draft prepared by Mr. Radosevic, a line has been drawn through the word "United" and the words "Great Lakes" have been printed above it. Article 1.02 initially read: "The jurisdiction of this organization shall include all residents of Canada working as fishermen with any type of gear, or as tendermen, or engaged in fish canneries, reduction plants, fish cold storages, net lofts, fish camps, fresh fish docks or in any other operation connected with the fishing industry in Canada". However, Mr. Radosevic amended it by striking out the words "or as tendermen", "canneries", "reduction", and "fish camps", and by adding the phrase "the Great Lakes of" between "in" and "Canada". Thus, Article 1.02 in the draft constitution reads: "The jurisdiction of this organization shall include all residents of Canada working as fishermen with any type of gear, or engaged in fish plants, fish cold storages, net lofts, fresh fish docks or in any other operation connected with the fishing industry in the Great Lakes of Canada."

5. Mr. Arnold instructed Mr. Gandaio, and the others who attended at his office that day, concerning the steps to be taken to form a union. He provided them with the following agenda:

AGENDA FOR FORMATION OF GREAT LAKES FISHERMEN AND ALLIED WORKERS UNION

1. Appoint a Temporary Chairman of the Meeting.
2. Chairman presents the draft Constitution before the meeting of original 8 (more or less) Members.
3. Persons present at the Meeting approve draft Constitution.
4. Persons present at Meeting sign Applications for Membership and pay money or confirm that they have paid money. Stated by Chairman that they are all confirmed as Members.
5. The Chairman then requests that the constitution be adopted and ratified as the constitution of the new Union. A Motion is made and seconded to that effect and a vote is taken.
6. Officers are then elected pursuant to the Constitution.

6. After meeting with Mr. Arnold, the aforementioned four persons drove back to Leamington. At approximately eight o'clock that evening, Mr. Radosevic, Mr. Gandaio, and twelve

other members of the committee met at the Peelee Motor Inn. Notes of that meeting were taken by Tony Piexe who, together with Messrs. Gandaio and Radosevic, met with Mr. Arnold on May 3, to go over those notes and enable typewritten minutes to be prepared in respect of the portion of the meeting at which the steps listed in the aforementioned agenda were taken. Those typed minutes were later signed by Mr. Gandaio (as chairman of the meeting).

7. The majority of the persons in attendance at the April 21 meeting were fishermen employed by various fisheries. One of them worked for the respondent Kingsville Fishermen's Company Ltd. at its fish processing plant in Kingsville. Another was employed at the fish processing plant of another company (which is not one of the respondents in these proceedings). Still another was an employee of the Town of Leamington not involved in the fishing industry. Others were unemployed on the date of the meeting.

8. During the first hour of the meeting, various financial decisions were made concerning such matters as payment of Mr. Radosevic's plane fare from British Columbia and payment of Mr. Arnold's professional fees. Various plans for the general meeting scheduled for the following day were also discussed. At approximately 9:00 p.m. the group began to follow the agenda provided by Mr. Arnold. A motion was passed by which Mr. Gandaio was made the temporary chairman of the meeting. Mr. Radosevic then read the draft constitution (Exhibit #1 in these proceedings) to the persons present at the meeting from the single copy of that document which was available at that time. Since about half of the persons in attendance spoke only Portuguese, Mr. Gandaio translated into Portuguese what Mr. Radosevic was saying and reading. After the draft constitution had been read, a motion to approve it was carried unanimously.

9. With the exception of Mr. Radosevic and one other person, those in attendance at the meeting then joined the applicant by signing applications for membership in the applicant and paying initiation fees. A motion to adopt and ratify the constitution was then carried unanimously.

10. The next motion passed called for elections to be held for the positions of President, Secretary, and Treasurer. Since Domingos Belo was the only person nominated for the position of President, he was declared by Mr. Gandaio to be President by acclamation, following a unanimous vote by voice and show of hands. Two persons were nominated for the position of Secretary. However, one of them declined nomination. Accordingly, the remaining nominee, Carlos Castro, was declared to be Secretary by acclamation following a similar vote. Three persons were then nominated for the position of Treasurer. However, two of them declined their nominations. Accordingly, Bill Hodgson, the remaining nominee, was declared to be the Treasurer by acclamation, following a unanimous vote by voice and show of hands. Neither Mr. Belo nor Mr. Hodgson was present when those votes were conducted, as they did not arrive at the meeting until about fifteen minutes before it ended (sometime between 10:30 and 11:00 o'clock). However, they had previously advised Mr. Gandaio that they were prepared to accept nominations for those positions. Upon their arrival at the meeting, they joined the applicant and accepted their acclamation to those positions. (Mr. Hodgson was an employee of the respondent Lake Erie Foods Inc. prior to April 21, 1986. The legality of the termination of his employment with that respondent has been placed in issue in a complaint by the applicant under section 89 of the Act.)

11. On the following day, a general meeting of the membership of the applicant was held at the local Portuguese Community Centre. The constitution which had been adopted at the meeting on the previous evening was presented and approved at that general meeting.

12. During the course of argument, the Board was referred to the following provisions of the applicant's constitution:

GREAT LAKES FISHERMEN & ALLIED WORKERS UNION

• • • •

OBLIGATION

I, pledge my word in the presence of witnesses, to abide by the Constitution and By-laws of this organization. I solemnly promise to do all in my power to further the aims of unionism as long as I remain a member of this Union.

ARTICLE 1

NAME AND JURISDICTION

1.01 This Organization shall be known as the Great Lakes Fishermen and Allied Workers' Union.

1.02 The jurisdiction of this organization shall include all residents of Canada working as fishermen with any type of gear, or engaged in fish plants, fish cold storages, net lofts, fresh fish docks or in any other operation connected with the fishing industry in the Great Lakes of Canada.

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ARTICLE 3

MEMBERSHIP AND DUES

• • • •

3.04 No vessel owner or any other person employing more than two persons in the fishing industry shall be eligible for membership. This shall not apply to owners who, for a period of less than three months in the year, may temporarily operate the vessel with more than two persons in the fishery. No member of this Union shall hold membership in a fishing vessel owners' association with which the Union conducts collective bargaining. The General Executive Board is empowered to give interpretation to this section as required.

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DUES

3.06 The initiation fee for new members of the Union shall be \$25.00.

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ARTICLE 5

ELECTION OF OFFICERS

5.01 The titled Officers of the Union shall consist of a President, a General Secretary and Treasurer. The titled Officers of the Union shall by virtue of their office be members of the General Executive Board.

• • • •

5.03 The titled Officers of the Union shall be elected by secret ballot of the membership.

• • • •

ARTICLE 9

9.01 On any matter which requires a decision by the entire membership, a secret ballot shall be

taken in every Local, it being understood that this Article is not to conflict with any Article in the Constitution where a referendum vote is deemed necessary. A two-thirds majority of the total votes cast, exclusive of blanks and disqualified ballots, shall be necessary to reach such a decision.

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ARTICLE 14

AIMS AND OBJECTS

(A) The Aims and Objects of the Union shall be: To organize and represent its members and all persons eligible for membership regardless of national or racial origin, creed or colour.

(B) To promote and protect their economic and social interests.

["(C)" was deleted (by means of a line drawn through it) in the draft constitution approved and ratified on April 21.]

(D) To secure for its members equitable compensation and satisfactory conditions of employment.

(E) To negotiate and enter into agreements, schedules and codes with their employers or associations of employers.

13. Counsel for the applicant contended that all of the steps necessary to form a trade union were taken on April 21, 1986 in respect of the applicant. Counsel for Northshore Fishery Inc. ("Northshore"), on the other hand, submitted that the Board should not recognize the applicant as a trade union. His submissions were adopted by counsel for each of the other respondents, and also by counsel for the objectors in File No. 0256-86-R. Mr. Sims, counsel for the objectors in File No. 0256-86-R, advised the Board that his clients were taking no position concerning this aspect of the proceedings.

14. In support of Northshore's position that the applicant is not a trade union, Mr. Nolan submitted that there was a lack of reliable evidence before the Board concerning exactly which document was "purportedly adopted" as a constitution at the meeting on April 21. However, we are satisfied on the totality of the evidence that Exhibit 1 in these proceedings is the constitution that was duly adopted and ratified at that meeting.

15. Mr. Nolan further argued that the persons present at that meeting did not become members of the applicant as there is no evidence that they took the pledge which appears under the heading "OBLIGATION" (immediately above Article 1 of the constitution), which he submitted to be a prerequisite for membership in the applicant. He further contended that the applicant had failed to prove that those persons had paid the initiation fee prescribed by Article 3.6. However, as indicated above, we have found that, with the exception of Mr. Radosevic and one other person, all of the persons in attendance at the meeting joined the applicant by signing applications for membership in the applicant and paying initiation fees. That finding is supported not only by the minutes of the meeting, but also by some of the documentary evidence of membership filed by the applicant in support of these applications. In this regard, we note that under section 1(1)(l) of the Act, "member", when used with reference to a trade union, includes a person who,

- (i) has applied for membership in a trade union, and
- (ii) has paid to the trade union on its own behalf an amount of at least one dollar in respect of initiation fees or monthly dues of the trade union

and ‘membership’ has a corresponding meaning”. Thus, we are satisfied that the aforementioned persons did become members of the applicant at the April 21 meeting, as contended by counsel for the applicant.

16. Mr. Nolan also argued that the applicant is not a trade union because some of the people who purported to join the applicant were not employees. It was his position that under section 1(1)(p) of the Act, a trade union must be composed *exclusively* of employees. He further contended that Article 3.04 of the applicant’s constitution precludes a finding of trade union status in that it permits vessel owners to join the applicant in some circumstances. Mr. Nolan characterized vessel owners as employers or members of management. However, no evidence was called concerning their employment status or their duties and responsibilities.

17. Article 3.04 indicates that vessel owners employing no more than two persons in the fishing industry, and vessel owners who for a period of less than three months in the year temporarily operate a vessel with more than two persons in the fishery, are eligible for membership in the applicant. However, it precludes members of the applicant from holding membership in a fishing vessel owners’ association with which the applicant conducts collective bargaining. (It also empowers the applicant’s General Executive Board to interpret it.)

18. In *Board of Education for the City of York* (also known as the “Humewood House” case), [1984] OLRB Rep. Sept. 1279, the Board considered and rejected the argument that the phrase “organization of employees” in section 1(1)(p) of the Act means “organization of employees only”. After exhaustively considering the Board’s earlier jurisprudence concerning that issue, the majority of that panel wrote, in part, as follows:

55. These authorities do not sit well together, and it does not appear to us that the Board’s jurisprudence in this area unequivocally supports the proposition that an association cannot be described as a trade union if it includes in its membership persons who, in the opinion of the Ontario Labour Relations Board, exercise managerial functions. Further, and more to the point, it is not apparent that the *Labour Relations Act* supports such a proposition. In that regard, it will be useful to set out the relevant statutory provisions:

1.-(1) In this Act,

- (p) “trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

13. The Board shall not certify a trade union if any employer or any employers’ organization has participated in its formation or administration or has contributed financial or other support to it...

48. An agreement between an employer or an employers’ organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers’ organization participated in the formation

or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union;...

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

105. Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause 1(1)(p), such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

This Board does not "confer" or "grant" or, to use the language of the Board in the *HEPCO* case [[1971] OLRB Rep. Aug. 501], "give" organizations "trade union status". The only use in the Act of the term "status" in that connection is in the marginal note to section 105 of the Act. The actual language of that section, however, makes it clear that the Board only makes a finding of fact that an organization is a "trade union", it does not give the organization some characteristic it does not already have. "Trade union" is a description, not an award. The only "status" or *in rem*, quality which attaches to a determination that an organization fits the statutory definition is that the determination, once made, can be set up as *prima facie* evidence of that fact in subsequent proceedings involving employers and employees who were not parties to the proceedings in which the determination was first made. Sections 13 and 48 describe an organization which has been the object of employer participation or support as "a trade union". If employer participation or support disqualified an organization of employees from being described as a "trade union", as paragraph 12 of the *Children's Aid Society* decision [[1976] OLRB Rep. Nov. 651] suggests, then the above quoted portions of sections 13 and 48 would be meaningless and unnecessary. On the language of section 13 and 48, employer domination does not result in the withholding or removal of the "trade union" label; it results in a denial of certain rights which would be enjoyed by a trade union which was free of employer domination. A finding that an organization is a "trade union" must not, therefore, be conclusive as to that organization's "status" to be recognized or certified as a bargaining agent under the *Labour Relations Act*. The legislature's object was to ensure that employers and bargaining agents deal at arm's length, and to prevent employer dominated unions from standing in the way of organizational efforts of truly employer-independent trade unions. The statutory language employed to accomplish this policy does not require us to read into section 1(1)(p) a limitation based on the nature of duties performed for their employer by individual members of what would otherwise be a trade union.

56. The *HEPCO* case held that the phrase "organization of employees" must be read as "organization of employees only", having regard to the precision with which the meaning of the word "employee" is limited by paragraph 1(3)(b) of the Act. That reading of the language of paragraph 1(1)(p) would exclude from trade union membership not only managerial persons who would be considered "employees" but for the deeming provision of paragraph 1(3)(b), but also persons who are not in any sense of the word anyone's "employee". If that were the intention of the Legislature, then why did it so carefully use the "person" in section 3 when describing those who may join and participate in trade unions? The use of that word must at very least contemplate trade unions having members who are not "employees" because they are unemployed: see *Ottawa General Hospital*, [[1974] OLRB Rep. Oct. 714], at paragraphs 24 and 26. While the language of section 3 of the Act does not create for managerial persons a protected right to join and participate in the activities of a trade union, that language is clearly inconsistent with an interpretation of section 1(1)(p) which requires that the phrase "organization of employees" be read as "organization of employees only". It is noteworthy that none of the decisions which favour the "employee only" interpretation of section 1(1)(p) makes any reference to section 3 of the Act.

57. The *HEPCO* "employee only" interpretation of paragraph 1(1)(p) not only fails to take the language of section 3 into account, it also comes into conflict with characteristics of organizations commonly thought of as trade unions. We have already observed that craft unions tend to

have “managerial” members, and that an “employees only” definition would prevent the unemployed from joining trade unions. It must also be recognized that trade unions are often employers themselves; indeed, trade union employees can be and have been the subject of certification applications. In defining a bargaining unit of trade union employees, paragraph 1(3)(b) comes into play and those who act on the union’s behalf in hiring, firing and directing the work of its employed staff will be excluded as “managerial”. If paragraph 1(1)(p) means what HEPCO says it does, then either those managerial persons would have to give up their union membership, or the trade union would have to give up its managers or its employees or forfeit its “status”. This is an absurd result.

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59. We conclude that the phrase “organization of employees” in paragraph 1(1)(p) of the Act does not mean “organization of employees only”. The mere fact that an organization has in its membership persons whose employment requires them to exercise managerial functions within the meaning of paragraph 1(3)(b) of the Act will not stand in the way of a finding that the organization is a “trade union” within the meaning of paragraph 1(1)(p) of the Act, if it otherwise qualifies to be so described. We respectfully decline to follow those earlier decisions which held otherwise. We acknowledge and share the concern those earlier decisions expressed about the “potential for conflict of interest” which can appear when managerial employees are members of trade unions. The need to keep employers and bargaining agents at arm’s length is fundamental to the scheme of the *Labour Relations Act*, but the right of employees on a majoritarian basis to freely choose their bargaining agent is equally fundamental. As a result, it is not for the Board to withhold rights from a freely selected trade union on grounds other than those contemplated by the Act. Sections 13 and 48 speak to actual employer participation and support. A speculative concern about an organization’s vulnerability to employer domination no more justifies denial of representation rights than would a concern that the composition of a trade union’s general membership, or of another bargaining unit it represents, might divert it from the single-minded pursuit of the interests of the employees in the particular bargaining unit it seeks to represent (see *H. Gray Limited*, 55 CLLC 18,011, and *Canadian Iron Foundries*, 56 CLLC 18,027). The *Labour Relations Act* provides safeguards against the realization of any potential for conflict of interest. By virtue of section 68 of the Act, a trade union which acquires the right to represent the employees in a bargaining unit assumes a duty to act fairly toward those employees in exercising that right, and that will require that the trade union avoid conflicts with the interests of persons excluded from that unit. While managerial membership alone will not trigger sections 13 and 48, the potential application of those sections to the trade union and, consequently, of section 64 to some one or more employers, will throw a spotlight on the reasons for such membership, and on the nature and degree of such members’ participation in the affairs of the trade union. In the ordinary case, one would wonder why a person would join an organization devoted to collective bargaining in which it cannot represent him. When he is actively involved in those collective bargaining activities, one’s wonder would grow at tolerance by his employer and by the trade union of any apparent conflict of interest, especially when the managerial employee has no protected right to join the trade union or participate in its activities. While it will be a question of fact in each case whether managerial members are acting on behalf of employers, there will be some cases where the absence of any explanation for the managerial employees’ membership and active participation in a trade union may support an inference of employer domination.... Thus, sections 13, 48 and 68 encourage trade unions to confine the influence of managerial members; section 64 provides a similar incentive to employers. These provisions, together with the bargaining unit’s ultimate remedy of changing or terminating its bargaining agent, are the safeguards the legislature has decided to provide for “conflicts of interest” in a system of free collective bargaining in which the concern for viable and independent bargaining representatives must share attention with the concern for the freedom to choose bargaining representatives on a majoritarian basis.

19. See also *The Board of Education for the City of York*, [1985] OLRB Rep. May 767, in which the majority of another panel of the Board adopted the views and approach set forth in that decision. In doing so, they wrote, in part, as follows at paragraph 45:

... the fact is that the Act *does not* expressly require that a trade union be composed *exclusively* of employees or of *employees only*; and since a trade union is not confined to purely collective

bargaining functions, one can easily envisage a variety of activities in which non-employee members might wish to engage; co-operative housing programmes, political activity, mutual insurance schemes, etc. Conversely, section 3 of the Act suggests that union membership should be open to *persons* - not *employees* wishing to participate in these lawful activities. Even within the realm of the union's core functions - collective bargaining - it is obvious that from time to time it will number among its members persons who are unemployed, and section 106(2) of the Act recognizes that a union may include among its members persons exercising managerial functions, because the definition of that term can often be subject to debate. Obviously such inclusion should not, in itself, prejudice the organization's status as a trade union.

20. We respectfully agree with the views expressed in those two decisions and the earlier Board decisions referred to therein which adopted a similar approach. Accordingly, we find no merit in Mr. Nolan's submission that those cases are wrongly decided and that Article 3.04 of the applicant's constitution precludes a finding of trade union status.

21. We also find no merit in Mr. Nolan's argument that the elections held at the April 21 founding meeting of the applicant were invalid because they were not conducted by secret ballot. As submitted by counsel for the applicant, the taking of a secret ballot vote was unnecessary in view of the fact that each of the officers was acclaimed.

22. Section 1(1)(p) of the Act provides:

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

The Board has indicated in a number of cases a series of steps which are generally sufficient to establish that such an organization has been brought into existence. Those steps were summarized as follows in *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797, at paragraph 11:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings.
2. The constitution should be placed before a meeting of employees for their approval either as originally drafted or as amended at the meeting.
3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1)(j) [now section 1(1)(l)] of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.
4. The constitution should be ratified by a vote of the members.
5. Officers should be elected pursuant to the constitution.

(See also *Comco Metal & Plastic Industries Ltd.*, [1979] OLRB Rep. June 498, and *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472.)

23. In the instant case, the evidence clearly establishes that the committee, with the benefit of legal advice from an experienced practitioner and the assistance of an organizer from the U.F.A.W.U., followed those steps, which have been set forth in the Board's jurisprudence for the guidance of persons wishing to form a trade union, and their advisors. They thereby brought into

existence “an organization of employees formed for purposes that include the regulation of relations between employees and employers” within the meaning of section 1(1)(p) of the Act.

24. In a letter dated May 27, 1986, counsel for Kingsville Fishermen’s Company Ltd. advised the Board that “on May 17, 1986, a meeting of the membership of the applicant was held, at which time the membership elected Mr. Julio Fiererra as President of the Applicant, replacing Mr. Domingo [sic] Belo.” That letter identified Mr. Fiererra as “the Captain of the fishing boat ‘Linda Jane’ owned by Liddle Brothers Fisheries”, and asserted that the election of Mr. Fiererra “confirms the actual presence of management in the Applicant’s organization, as envisaged by the constitutional documentation filed by the applicant at the hearing on May 16, 1986, and as such is evidence that the Applicant is not an organization of employees pursuant to section 1(1)(p) of the Act.”

25. Assuming without deciding that the facts alleged in that letter are true, the Board, on the basis of the reasoning set forth above respecting the meaning of the phrase “organization of employees” in section 1(1)(p) of the Act, is of the view that the presence of a member of management in the applicant’s organization does not preclude a finding that the applicant was duly formed as a trade union on April 21, 1986. Whether in light of section 13 of the Act the subsequent election of Mr. Fiererra will preclude the Board from certifying that trade union is an issue that can be dealt with in conjunction with the other issues remaining to be litigated in respect of these applications.

26. For the foregoing reasons, the Board hereby finds that the applicant became a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* on April 21, 1986.

27. The Registrar is directed to list File No. 0255-86-R for hearing for the purpose of hearing evidence and representations concerning the allegation by the intervener that Steven Little did not pay any money in connection with his application for membership in the applicant. In addition to Mr. Little, the persons to be summonsed by the Board to testify at that hearing are Joe Gandao, who appears to have signed as the collector on Mr. Little’s application for membership in the applicant, and Domingos Belo, the applicant’s Form 9 declarant in respect of that certification application. If time allows, the evidence and representations of the parties with respect to all other outstanding matters arising out of and incidental to that application will also be heard at that hearing.

28. File Nos. 0254-86-R, 0256-86-R, and 0257-86-R are referred to the Registrar to be listed for hearing for the purpose of hearing the evidence and representations of the parties with respect to all outstanding matters arising out of and incidental to them.

29. This panel is not seized with any of these matters.

1000-85-R; 1036-85-R Labourers' International Union of North America, Local 183, Applicant, v. **Frank Plastina Investments Ltd.** and Sherwood Village Homes Inc., carrying on business under the firm name and style as Grand Valley Homes, Respondents; Labourers' International Union of North America, Local 183, Applicant, v. Frank Plastina Investments Ltd. and Sherwood Village Homes Inc., carrying on business under the firm name and style as Grand Valley Homes, Respondents

Related Employer - Construction Industry - Purpose of s. 1(4) discussed - Legal basis of bargaining rights in construction industry canvassed - Nature of work in construction industry leading to finding of related employer

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *R. J. Gallivan* and *B. L. Armstrong*.

APPEARANCES: *L. Steinberg* and *T. Pinto* for the applicant; *Donald Francis*, *Peter Plastina* and *Frank Plastina* for the respondents.

DECISION OF THE BOARD; June 23, 1986

I

1. These are two related applications made, initially, under sections 63 and 1(4) of the *Labour Relations Act*. At the hearing the union withdrew the assertions based upon section 63. There is a further related application under section 124 of the Act, but the union concedes that if it cannot establish that the respondents are "related employers" within the meaning of section 1(4), the section 124 application will be irrelevant. Section 1(4) reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

2. It is unnecessary to record the troubled history of this proceeding or the parties' relationship. It suffices to say that when the hearing came on for continuation on May 21, 1986, the union and the respondents (now represented by counsel) were able to reach agreement on the facts which, in their view, were sufficient for the Board to determine the section 1(4) issue. Those facts, together with certain collective agreements, are referred to below. If the prose is sometimes less than perfect, it is because the agreed statement of facts was reached late in the day, it is handwritten, and, in part, it is in "point form". Both parties were anxious to make their arguments and conclude the hearing within the time already scheduled.

3. For ease of reference, we will refer to the respondent Frank Plastina Investments Ltd. as "FPI", and the respondent Sherwood Village Homes Inc. as "Sherwood". We should also note that Frank Plastina is Peter Plastina's father and that Frank Plastina Investments Ltd. is bound by a collective agreement between the Ontario Concrete & Drain Contractors Association, on the one hand, and Labourers' International Union of North America, Local 183 and International Union of Operating Engineers, Local 793, on the other. Some of the terms of that collective agreement will be referred to later.

4. With the reservation referred to above, we have tried to adhere to both the sequence and language of the parties' agreed statement of fact.

II - THE AGREED FACTS

5. FPI is a drain and concrete contractor which is one hundred per cent owned by Frank Plastina. Its head office is at 4701 Steeles Avenue. It has a yard and warehouse at 6315 Netherhart Road in Mississauga. Bargaining unit employees [represented by the union] report to 6315 Netherhart Road. Tools, equipment, and supplies are stored at that location. FPI owns a truck with the "FPI" name on its sides. FPI has never acted as a builder.

6. Peter Plastina was hired by FPI as an estimator in the early 1970's. For all intents and purposes, he was also the office manager. As an estimator, he did estimating, quoting, and negotiations for FPI; however, ultimate responsibility rested with Frank Plastina who set unit prices upon which estimates/quotes were based, and who decided which jobs to bid on and accept. Peter Plastina and Frank Plastina negotiated together as part of the negotiating team of the Ontario Concrete & Drain Association on behalf of FPI and the resulting collective agreements were signed by Peter Plastina on behalf of FPI.

7. Sherwood was incorporated for the purpose of a residential project at Highway #10 and Eglinton Avenue. No shareholders contributed any funds to the capitalization of the company. Sherwood has no employees. Peter Plastina's services and those of an on-site supervisor are provided under a "management for fee" contract. All business decisions are made by Peter Plastina himself.

8. The respondents FPI and Sherwood have common premises and offices, use common solicitors (both corporate and for labour relations purposes), have a common bank, and employ the same accountants. Peter Plastina signed all documents in these proceedings on behalf of *both* FPI and Sherwood. The telegrams (dated January 6th and January 27th, 1986) *from FPI*, refer to *Peter Plastina's* inability to attend the Board's hearing. Peter Plastina owns Grand Valley Building Supplies Inc. from which company FPI buys all construction materials. This company, too, is located at 4701 Steeles Avenue, the head office location of FPI which is owned by FPI. Sherwood pays no rent for its use of that location. Any rent paid by Grand Valley Building Supplies to FPI is in the form of a credit against amounts purchased from Grand Valley Building Supplies. The company 4701 Steeles Holdings Inc., owned by Peter Plastina, collects rent for FPI.

9. Peter Plastina abandoned his position at FPI as estimator/office manager in 1981, however, he has been FPI's "secretary" since 1978. In that capacity he continues to oversee the administrative end of FPI's operation and signs contracts on behalf of FPI. The bids themselves are signed by the estimator. Frank Plastina oversees the completion of FPI contracts, including on-site supervision, crew makeup and scheduling. He retains ultimate decision-making authority and would, as necessary, point out problems and direct that corrections be made by employees of other contractors. FPI has employed an estimator since Peter Plastina's change of role in 1981, as well as an office manager, accounts payable clerk, accounts receivable clerk and receptionist. The receptionist answers telephones and provides clerical services for both FPI and Sherwood which have different telephone numbers. The receptionist is an FPI employee. There is no charge to Sherwood for her services. Accounting work done for Sherwood is done by another Peter Plastina company.

10. Peter Plastina went into business as a builder in 1973 - originally with a partner: "Dan Vano Construction Ltd.". Later he engaged in business for himself. He carried on this building business while working for Plastina and Costa (a predecessor to FPI) and for FPI itself. Peter Plastina is responsible for all aspects of his own building projects, including the project undertaken by

Sherwood Village. Peter Plastina's building business operates in accordance with the following pattern:

- serviced lots in a subdivision are sought from developers
- a decision is made to purchase a particular group of lots
- a corporation is formed
- financing is arranged
- decisions are made as to the market segment to which the project is to be directed (this governs house design, size and price range)
- an architect is retained
- a sales campaign is undertaken, including an on-site sales pavilion, signs, brochures, and renderings of available models
- commissioned sales agents are retained on site to sell the homes
- an advertising firm is retained to undertake an advertising campaign
- houses are pre-sold (fifty per cent of the homes must be pre-sold before any construction begins)
- a construction schedule is developed on the basis of pre-sales and closing dates
- final working house plans are issued for tender to subcontractors
- all actual construction is subcontracted on the basis of negotiated sub-contracts for such work, services, or supplies as: surveyor, excavation and grading, basement foundation, steel (supplier), window (supplier), lumber (supplier), rough carpentry, trusses, shingles, masonry, concrete and drain, plumbing, electrical, heating, drywall and insulation, flooring, broadloom, kitchen, trim-carpentry, eaves trough and aluminum soffit, and housekeeping.

11. As a drain and concrete contractor, FPI excavates trenches for drain and sanitary lines from each housing lot to main lines, installs drains, and pours basement and garage floors, door sills and porches. FPI was a contractor on the Sherwood project at Highway #10 and Eglinton. The concrete and drain subcontract let by Sherwood to FPI, was let without tender, albeit at fair market value. The contract was signed on behalf of FPI by the estimator and on behalf of Sherwood by Peter Plastina. FPI also provided labour for housecleaning, patching concrete, etc. for which there were extra payments also at fair market value. FPI also provides labour for this purpose to other builders. The Sherwood contract was a small part of FPI's 1985 business. Frank Plastina supervised all employees of FPI when on the site.

12. For the purpose of doing site cleanup work at the Eglinton and Highway 10 project, one employee of FPI was transferred to the payroll of a Peter Plastina company and paid \$6.00 per hour. [The precise name of this company is not identified in the agreed facts.] This employee trans-

ferred to the Sherwood project, was doing work for Sherwood, but being paid by Peter Plastina. Sherwood itself had no payroll.

III

13. It is not disputed that FPI is bound by the agreement between the applicant union and the Ontario Concrete & Drain Contractors Association. That agreement is interesting because it recognizes that a contractor, ordinarily engaged in concrete and drain work, may also be involved, from time to time, in other kinds of work which could be done by employees supplied by the applicant union. We use the term “supplied” because, in the volatile employment environment of the construction industry, the union is not just the bargaining agent for its members, but can also provide access to employment itself, through the operation of its “hiring hall”. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site (see generally: *R. M. Hardy and Associates Limited and Teamsters, Local 213*, (1977) 2 Can.L.R.B.R. 357). Construction industry collective agreements generally require that when a unionized contractor needs tradesmen, he must go to the union to fulfill his needs. The agreement guarantees access to available work opportunities, and, to this extent, the “hiring hall” provides a kind of job security in the construction industry just as seniority does in an industrial context. The hiring hall and subcontracting provisions would be totally frustrated if an employer could avoid them simply by incorporating another company which is not bound by the terms of the collective agreement (see: *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247). The negotiated right of access to arising work opportunities would become entirely illusory.

14. As we have already mentioned, the possibility that a contractor might expand from his usual area of operations into another segment of the construction industry is explicitly recognized by the so-called “cross-over clause” appearing as Article 10.04 of the “Concrete & Drain” collective agreement. If a concrete and drain contractor performs some other kind of work, covered by the union’s other collective agreements, he is automatically “plugged in” to those agreements and must apply their terms. The agreements incorporated by reference are: “the roads agreement”, “the sewer and watermain agreement”, “the heavy engineering agreement”, “the [concrete] forming agreement”, “the apartment builders agreement”, “the utilities agreement”, “the house basements agreement”, “the house builders agreement”, and “the residential housing carpentry agreement”. In all of these areas of the construction industry, unskilled and semi-skilled labourers are typically represented by the applicant, and the cross-over clause ensures that whenever an employer needs labourers he must hire the applicant’s members.

15. In the instant case, the union asserts that the residential site cleaning work performed by the labourer for Sherwood would fall within the ambit of Schedule “A”, item 6 of the “house builders agreement” referred to at Article 10.04 of the concrete and drain agreement. The union’s position is that this labourer, engaged in site cleanup, (initially employed and supplied by FPI, but paid by Peter Plastina, or one of his companies), should have been recruited through the hiring hall, and paid in accordance with the terms of the collective agreement. The respondents concede that they are under common control and direction. The respondents’ position is that FPI and Sherwood are not involved in “associated activities or businesses” and that, in any case, the Board should exercise its discretion not to declare them to be “one employer”.

IV

16. Both parties (albeit for different reasons) referred to an earlier Board decision in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945. We were also referred by the respondents to the Board’s decisions in *Trans-Nation Incorporated*, [1980] OLRB Rep. Dec. 1835, and *Arbis Construction Ltd.*, [1983] OLRB Rep. Dec. 1959. The purpose and effect of section 1(4) of the Act

is discussed in a long passage in *Brant Erecting and Hoisting, supra*, to which we might usefully refer:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [63] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section [63] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section [63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [63] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

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15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in "associated or related activities or businesses" since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be "related" within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and can-

not be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the “associated or related activities or businesses” need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

Section 1(4) shifts the focus from the legal vehicles chosen by entrepreneurs to carry on, expand, or diversify their businesses to the nature and functional coherence of those activities and their relationship to statutory collective bargaining rights. Section 1(4) is most commonly invoked by trade unions to prevent an erosion of bargaining rights when business activities otherwise subject to a collective agreement are undertaken by a new corporate vehicle, however, the section can also be invoked by employers to ensure that a related business is not fragmented for collective bargaining purposes along corporate lines which do not accord with sound industrial relations policy (see *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. March 247, and *Harwill Originals Ltd.*, [1982] OLRB Rep. June 875).

17. If the purpose of section 1(4) is to preserve bargaining rights, it may be useful to briefly mention the legal basis for those rights - with particular reference to the construction industry.

18. The initial and primary foundation of a union's bargaining rights is the Board's certification process which requires the union to establish majority support in an appropriate bargaining unit. However, in the construction industry, OLRB certificates are *not* limited to the particular construction projects, sectors or activities in which the employer is or may be engaged from time to time. Prior to 1978 a Board certificate might be limited to a particular geographic area but it would not be limited by sector. Under the new provincial bargaining scheme, a union is issued one certificate in respect of industrial, commercial and institutional construction, province-wide, and a separate certificate covering all other sectors in the appropriate geographic area. The ICI sector is distinguished for bargaining purposes, but a union's bargaining rights are still not limited to a particular sector. Unless the trade union is prepared to willingly sign a collective agreement restricted to the employer's main activity or the particular sector in which he is engaged, the union will have bargaining rights “across the board.” Thus, if the union had recently been certified to represent the employees of FPI, it would have bargaining rights for labourers in all sectors of the construction industry in which they might be employed.

19. In the instant case, of course, the union's bargaining rights for FPI are not rooted in a Board certificate, but rather the collective agreement with the Sewer and Watermain Contractors Association to which FPI is bound but, because of the “crossover clause”, that agreement is, in effect, a multi-sector agreement. There is no doubt that if FPI engaged in heavy engineering, road work, house building, etc., the collective agreement would apply to those activities and FPI would be bound to recognize the union's bargaining rights for labourers. The question here is whether Sherwood is under the same obligation.

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20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature (“associated” or “related”, “activities” or businesses”), it is apparent that the section was

intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine*, *Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC 14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills. Moreover, while "common control or direction" may be a separate element in the section 1(4) test, it is difficult to say here that the business or activities of Sherwood are *unrelated* to those of FPI when Peter Plastina plays such a prominent role in both businesses and Sherwood draws so heavily upon elements of FPI's business. This is not a case in which Peter Plastina has struck out on his own and developed his own business entirely independent of that of his father with whom he only has occasional subcontracting relationships. Without at this point repeating the agreed facts, it is apparent that Sherwood and FPI (and indeed the other "Peter Plastina companies") are in a symbiotic relationship. No doubt Sherwood might have been established independently without using the banking facilities, premises, employees etc. of FPI; but the reality here is a family business in which Peter Plastina is intimately involved and of which Sherwood is a related part. The fact that FPI is a sewer and watermain contractor while Sherwood is a builder is not, in our view, significant. Not only are these both parts of the construction industry, but the FPI collective agreement specifically recognizes the possibility of doing that kind of work. This is not the case of a tobacco firm opening a distillery run by a wholly owned subsidiary or a manufacturer of industrial chemicals getting into the restaurant business. In those situations one might sensibly argue that the business activities were not associated or related. Here, it is our opinion that FPI and Sherwood are clearly engaged in associated or related activities or businesses, and we see no reason why we should not so declare.

21. For the foregoing reasons the Board declares that the respondents are one employer for the purposes of the *Labour Relations Act*.

1705-85-R Olga York, Applicant, v. Service Employees Union, Local 183, Respondent, v. Gardiner's Supermarket Limited, Intervener

Petition - Termination - Owner's wife part-time employee - Speaking at employees' meeting and signing petition - Wife's involvement suggesting management interest in petition - Reasonable fear of employees that management would know identity of those not signing - Board rejecting petition as involuntary

BEFORE: *Robert J. Herman*, Vice-Chairman, and Board Members *F. W. Murray* and *P. J. O'Keeffe*.

APPEARANCES: *Olga York*, *Judy Dainard*, *Harry Williams*, *Melvin Kleinsteuber* and *Marjorie Tregarthen* for the applicant; *G. Charney*, *Don Burshaw*, *C. Wilkey* and *Dale Houlding* for the respondent; *Kees W. Kort* and *Gary Gardiner* for the intervener.

DECISION OF ROBERT J. HERMAN, VICE-CHAIRMAN, AND BOARD MEMBER P. J. O'KEEFE; June 27, 1986

1. This is an application brought pursuant to section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent trade union with respect to both full-time and part-time units of employees employed by the intervener employer, Gardiner's Supermarket Limited.

2. In a prior decision of this Board, differently constituted, issued on December 10, 1985, the Board held that this application was timely and satisfied the requirements of section 57 of the Act in that respect.

3. Based on the list of employees filed by the intervener employer with respect to both bargaining units, and based further on the several petitions filed in this proceeding purporting to evidence the desire of employees in the bargaining units in question that they no longer wish to be represented by the respondent, the Board would ordinarily order a representation vote if those individuals who signed the petitions are found to have voluntarily so signed. In order to ascertain whether the petitions as filed represented the voluntary wishes of the petitioners, the Board heard evidence as to the circumstances concerning the origination of the petition and the manner in which each of the signatures on it was obtained. Additionally, the respondent union filed extensive particulars of misconduct surrounding the origination and circulation of the petition and the Board heard evidence with respect to those matters as well.

4. The intervener employer, Gardiner's Supermarket Limited, has for many years been a family owned supermarket in the town of Picton, Ontario, owned and operated by members of the Gardiner family. The current general manager, and part owner, is Gary Gardiner. The intervener has a history and practice of hiring relatives of current employees, or their friends, and rehiring former employees who wish to return to the supermarket. Not surprising for a small town supermarket, the evidence suggested that employees, if not related to each other, were quite familiar with the relationships and social interactions amongst numerous employees and management or amongst employees themselves. In part it is these relationships that give rise to the respondent's concern that the petitions as filed do not represent the voluntary wishes of the employees.

5. The petitioner and five witnesses called by the petitioner all gave evidence as to the origination and circulation of the three filed petitions. We do not propose to review this evidence in any detail. Any discrepancies with respect to dates, or locations where particular signatures were obtained, in our view are the natural and expected discrepancies where several witnesses attempt to the best of their recollection to recall events which occurred many months earlier, and occurred at a time when the witnesses might not have reasonably anticipated that they would subsequently be asked to recount in explicit detail how each of the signatures was obtained.

6. All the signatures on the three petitions were obtained off the premises of the employer, by one of the several witnesses called by the petitioner. The signatures in the first petition were collected between September 11, 1985 and September 15, 1985; the signatures in the second petition were collected between October 16 and October 17, 1985; and the signatures on the third petition, circulated and obtained after a prior hearing before this Board during which the terminal date was extended, were collected between December 5 and December 6, 1985.

7. On September 11, 1985, at the initial meeting where employees signed the first petition, the applicant Mrs. York and others who were assisting her in the collection of signatures addressed the employees then present and explained the purpose of the meeting and afforded them an opportunity to sign the petition. One of those present at this first meeting was Margaret Gardiner, the

wife of the owner and general manager Gary Gardiner, and from time to time, a part-time employee within the bargaining unit. However, at the time that this meeting of employees was held, Mrs. Gardiner had not worked as an employee of the intervener employer for over one year, since September 8, 1984. The evidence further disclosed that she was not recalled to work with the intervener, as a part-time employee, until September 17, 1985. At this employees' meeting, when as noted the first signatures on the first petition were obtained, Mrs. Gardiner herself signed the petition, and addressed those employees present. The applicant testified that Mrs. Gardiner expressed her opinion that employees might find it hard to find another job if they joined the union. In her own evidence Mrs. Gardiner testified that she probably had indicated to employees that if they had any problems, they ought to approach her husband directly as he had always been responsive to settling employees' problems. She further testified that she had indicated that, based on her experience and talking to people, if individuals joined the union they would have a tough time getting a job in Picton in a bank.

8. The evidence discloses further involvement by Mrs. Gardiner in the employer's affairs, at times when she was not an employee. Mrs. Gardiner almost daily walked through the supermarket, looking at the various departments and seeing how the store was operating at the time. In part she testified she did so for social reasons, but additionally she would on occasion have meetings with her husband in his office at the supermarket, where they discussed operational matters. One of the witnesses called by the petitioner testified that when she heard Mrs. Gardiner addressing employees at the September 11, 1985 meeting, the witness felt that Mrs. Gardiner was speaking not as another employee but on behalf of management. The applicant herself testified that at a meeting of employees on September 17, 1985 at the Rickerton Hotel, when employees were about to be asked by those organizing the petition as to their wishes with respect to the union, another employee advised the petitioner that they ought not to openly ascertain employee wishes as Margaret Gardiner was present.

9. Again, at the time Mrs. Gardiner participated in the first meeting of employees who signed the first petition, on September 11, 1985, she was not an active employee working at the supermarket, nor had she been for over a year. It is also worth repeating that the petitioner led evidence which indicated that at least one employee felt that Mrs. Gardiner spoke on behalf of management and not merely on behalf of herself. Taken together and in context, the Board concludes that employees would reasonably have inferred that Mrs. Gardiner spoke on behalf of management, and therefore such employees would reasonably have perceived that management had a particular interest in the termination of bargaining rights of the respondent union. If nothing else, the fact that Mrs. Gardiner signed all three petitions would have suggested to employees that management would be made aware of whether a particular employee had or had not signed a petition.

10. The union based their objection to the voluntariness of the petition not only upon the involvement of Mrs. Gardiner, as outlined above, but on the additional bases that the intervener employer itself had become involved in the petition or at least created an atmosphere at work which would make clear to employees that it opposed the union. Alternatively, management was alleged to have been directly involved in supporting the petitioner, as the petitioner had received favourable employment conditions, including pay rates above the collective agreement scale, preferential scheduling in not having to work weekends, and management had been involved in the manner in which Mrs. York obtained her job in the first place. We need not base our decision upon any of these grounds, as in the Board's opinion the involvement of Mrs. Gardiner was alone sufficient to cast doubt upon the voluntariness of the petition. As we have noted, her involvement at the beginning of the first petition was such that employees would perceive management as having a vested interest in the petition, or at least, employees would reasonably have feared that their involvement in the petition would have been brought to the attention of management. Mrs. Gardi-

ner signed all three petitions, and in the small closely-knit atmosphere of the intervener's supermarket it is a reasonable inference that Mrs. Gardiner's involvement and her comments would be known to virtually all employees in both bargaining units. In turn, employees' awareness of her participation and their perception of her vested interest would render involuntary the subsequent petitions, which petitions Mrs. Gardiner signed as well, and which petitions would have been signed after employees were aware of Mrs. Gardiner's participation in the proceedings, her comments rendered at the first petition meeting on September 11, 1985 and her participation at the meeting at the Rickerton Hotel on September 17, 1985.

11. Although unnecessary for us to rule upon these other allegations raised by the union, we would note that the evidence disclosed no improper conduct on the part of the company *per se* nor any involvement by the company in the petition that would suggest the company sought to intimidate or coerce employees to sign the petition. We also find that the company's treatment of Mrs. York, with respect to her wages, scheduling, and the manner in which she obtained her job does not support the union's contention that management was in an improper fashion preferentially treating Mrs. York, nor that because of this preferential treatment employees signing the petition would have perceived Mrs. York as aligned to management.

12. The Board was referred to numerous cases, many dealing with family relationships or other close relationships which have effected the voluntariness of a petition. In that regard we were referred to *Pigott Motors (1961) Limited*, 63 CLLC 1125, *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. November 813, *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759, *Patro d'Ottawa*, [1984] OLRB Rep. May 741, *Otto's Deli*, [1980] OLRB Rep. Nov. 1673, *Jean Marc Joanisse*, [1983] OLRB Rep. Jan. 92, *Domus Building Cleaning Co. Ltd.*, [1986] OLRB Rep. Mar. 319.

13. As the Board stated in *Domus Building Cleaning Co. Ltd.*, *supra*, at para. 16:

The Board has indicated in a number of cases that a petitioner's personal relationship with a member of management and the awareness of this relationship by employees in the bargaining unit are factors to be considered in assessing whether or not the signatures expressed the true wishes of the employees who signed. See for example *Labatts Ontario Breweries*, [1985] OLRB Rep. March 433; *International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690; *Ottawa Commercial Realities Limited*, [1983] OLRB Rep. Nov. 1877; *Jean Marc Joanisse*, [1983] OLRB Rep. Jan. 92. As the Board stated in the *Ottawa Commercial Realities Limited* case, *supra*, at paragraph 10:

Section 57(3) of the *Labour Relations Act* requires that we satisfy ourselves that the written statement of desire filed in support of a termination application represents the voluntary signification of the wishes of the employees who signed it. The approach taken to voluntariness is explained by the Board in *Grove Park Lodge*, [1980] OLRB Rep. Feb. 235 at p. 240 in the following terms:

The Board has always been sensitive to the particular vulnerability of employees arising out of the employer-employee relationship. As stated in the *Pigott Motors (1961) Ltd.* case, 62 CLLC 16,264:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests

and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document such as petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories.

and in the *Peel Block Co. Ltd.* case, 63 CLLC 16,227:

It is a function and duty of this Board to be vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent.

See also *CCH Canadian Limited*, [1975] OLRB Rep. Jan. 19, which involved an application for termination of bargaining rights.

17. The Board has before it, in the present case, a cogently-worded statement of desire signed by almost the full complement of the bargaining unit. The Board must still be satisfied, however, that the motivation behind such a statement was of a truly voluntary nature; that is, as the above cases indicate, that the employees are not simply identifying themselves with the choice of their employer, out of fear of antagonizing their employer, or fear of reprisal, or for whatever reason. This is a fundamental duty which the Board owes to the employees themselves, and is made a pre-condition under section 49(3) of *The Labour Relations Act* to its power to direct the holding of a representation vote.

18. As the *Pigott Motors* case, *supra*, makes clear, so vulnerable are employees to employer influence that the influence need not even be created by employer design. The Board in a long line of cases has refused to accept as voluntary a statement of opposition to a trade union signed in circumstances where the employees could reasonably believe that their failure to sign would come to the attention of management. In the *Morgan Adhesives of Canada Limited* case, [1975] OLRB Rep. Nov. 813, for example, the Board stated at paragraphs 30 and 31:

30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board which would support such a finding.

31. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management.

19. In carrying out its statutory duty, the Board is at the same time conscious that it must not be overprotective of employees' interests to the point where its evidentiary requirements become an unwitting trap for those very employees trying to express themselves. At all times a balance must be struck.

14. In the instant proceeding we are not called upon to decide whether, if Mrs. Gardiner had been an active part-time employee during the times in question, her family relationship with the general manager would render the petition involuntary. In our view her active involvement, and the comments she made to employees at a time when she had not been a part-time employee for over a year, would clearly have suggested to employees that her husband, the owner and general manager, had a clear interest in the termination of bargaining rights of the union, and equally possible and important, whether or not the individual employee signed the petition would be disclosed to Mrs. Gardiner's husband. Under these circumstances, we are not satisfied that the petitions represent the voluntary wishes of the employees in the bargaining units in question and accordingly the Board cannot give them any weight.

15. In the result, the Board is not satisfied that not less than forty-five per cent of the employees of the intervener employer in the full-time and part-time bargaining unit at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of December 12, 1985, the terminal date fixed for this application. Accordingly, as the statutory requirement for the directing of the representation vote has not been met, this application must be dismissed.

DECISION OF F. W. MURRAY;

1. I dissent.

2. Having considered all of the evidence in this case, including the role played by Mrs. Gardiner, and the evidence adduced by the applicant concerning the hostility that developed between the petitioners and the Local Union representative as a result of the representative's behaviour at several union meetings, I would have found that the petition was a voluntary expression of opinion.

3. Accordingly, I would have ordered a representation vote.

0201-86-M Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Applicant, v. J. H. Lock & Sons Limited, Respondent

Construction Industry - Construction Industry Grievance - Practice and Procedure - Grievance alleging mechanic dismissed when not recalled after lay off - Whether notice of hearing to all mechanics in field required - Board enumerating criteria for dismissing application on preliminary objection - Timeliness of reference under s. 124

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *M. A. F. Stockton* and *P. J. O'Keefe*.

APPEARANCES: *L. Steinberg, J. Cawicato* and *M. Sumka* for the applicant; *G. W. Adams, Q.C., D. Gilbert, W. R. Ens* and *Allan Campbell* for the respondent.

DECISION OF THE BOARD; June 16, 1986

1. This is a reference under section 124 of the *Labour Relations Act* ("the Act"). The applicant alleges that Michael Sumka was dismissed by the respondent when the respondent failed to recall him after laying him off for shortage of work. The respondent denies that Sumka had any right to be recalled and therefore that he was not dismissed.

2. The hearing into this matter began on May 5, 1986. At the beginning of the hearing, counsel for the respondent raised the following preliminary objections to our hearing this reference:

- (1) Sumka is not an employee and therefore has no status to bring a complaint before the Board; since the union does not have status because this is not a policy grievance, there is therefore no grievance properly before the Board.
- (2) The notice requirements under the Act were not met.
- (3) The grievance is out of time since it was not filed within the 5-day limit provided in the collective agreement for the filing of a grievance.
- (4) There are no recall rights in the collective agreement and therefore there is no basis for the grievance.

3. In addition, the respondent raised questions of the relevance of the Service Agreement covering the applicant and the respondent and of onus and procedural order.

4. After recessing to consider each of the objections, we ruled that we were not prepared to dismiss the application at this time on any of the preliminary grounds raised by the respondent. The respondent requested written reasons for our decision. Accordingly, we here set out, in reverse order, our reasons for our decision to hear the reference on the merits and for our decisions with respect to the status of the Service Agreement and onus. The parties came to an agreement with respect to the order in which the parties will adduce evidence.

5. The applicant argued that the employer should adduce evidence first since this was a dismissal case. The respondent argued that this was not a dismissal case and therefore the applicant should adduce evidence first. The questions of onus and of procedure should be kept separate. The onus remains on the grievor throughout. There is no reverse onus provision involved here. However, the employer normally goes first in discharge cases because the employer is more likely to have the facts available to explain why the grievor was discharged. Once the applicant has made a *prima facie* case that there was a collective agreement, that the grievor was subject to it and that the grievor has been discharged contrary to the agreement, the evidentiary onus shifts to the employer to explain the discharge. In the instant case, the parties eventually agreed that the applicant would present its case first, without prejudice to the Board's ruling on the question of onus. The Board confirms, therefore, that the legal burden rests on the applicant throughout and notes, despite the allegation of discharge, that the applicant has agreed to adduce evidence first.

6. The respondent maintained that the Service Collective Agreement between the Union Maintenance and Service Contractors Members of the Ontario Refrigeration & Air Conditioning Contractors Association ("ORAC") and Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the union"), which was relied on in the application, has no applicability to the grievor. However, the respondent in its own reply stated that the Service Agreement applied to all work except ICI work, pursuant to Article of the Service Agreement. The grievor is a mechanic to whom the Service

Agreement appears to apply. The grievor does not perform work for the purposes of this application in the industrial, commercial and institutional sector. The grievor's case was based both on the Service Agreement and on the Construction Collective Agreement between ORAC and Local 787. The relevant provisions of both agreements are the same and therefore, even if we were to find that the Service Agreement does not apply to the facts of this case, the grievor still has available the Construction Agreement upon which to base his grievance.

7. With respect to the issue of notice, the respondent argued that the implications of this case affected all potential employees of the employer and, indeed, all mechanics in the field, since if the applicant were successful, potential employees might find that they would not be hired because the company was forced to recall other employees who had been previously laid off. The respondent argued that the notice which it posted on its site was insufficient because it did not inform all mechanics in the field of the hearing. In *Re Bradley et al and Ottawa Professional Fire Fighters Association et al* (1967), 63 D.L.R. (2d) 376, the Ontario Court of Appeal stated the requirements of notice in circumstances where "two employees or two groups of employees covered by the same collective agreement compete for benefits thereunder which are accorded by the employer to one or to one group only and the disappointed employee or group invoke the grievance machinery to seek redress and their case is taken to arbitration by their bargaining agent". In such cases, "it is reversible error on *certiorari* for the arbitrator to make an award in their favour which strips the other employee or group of the benefits in question if the latter have not been given timely notice that the benefits conferred upon them by the employer would be brought directly into question at the arbitration hearing and might be lost as a result thereof". In that case, the arbitrator interpreted a specific provision of the collective agreement and subsequently directed that five promotions which had been made by the fire chief be revoked. Those persons who had been promoted and would be demoted by the direction of the arbitrator had not been given notice. In our view, the facts of the instant case do not come within the *Bradley* facts. There was no direct competition between the present incumbent and the applicant for the job of mechanic. Furthermore, the Court of Appeal made it clear that if the arbitrator had simply interpreted the relevant article and had adjourned in order to determine the effect of that interpretation on the promotions already made, the notice requirements which had already been made would have been sufficient. The requirements of notice as set out in *Bradley*, and as applied to the situation described in *Bradley*, are that "it should be in writing indicating the issue or issues to be arbitrated as involving a possible diminution of the collective agreement benefits being enjoyed by the persons entitled to the notice; and it should advise of the date, time and place of hearing, of the right to be represented by counsel or otherwise, and should be served personally or by registered mail sufficiently in advance of the date fixed for the hearing to give the notified persons a reasonable opportunity to prepare their submissions if they decide to appear". In the instant case, the employer posted notice of the hearing, including the Form 104, Referral of Grievance to Arbitration under section 124, which included a statement of the grievance. Again, however, it is our view that the facts in this case do not fall within the facts set out in *Bradley* and therefore the fact that notice was not delivered personally or served personally on any particular employee or potential employee does not result in inadequate notice. In any case, it would be open to us to serve a particular individual with notice of our award should we find that Mr. Sumka has been wrongfully dismissed and that he should be reinstated: *Re McMaster University and Service Employees International Union, Local 532* (1975), 10 L.A.C. (2d) 130. We were informed that the person currently performing the mechanic's job at the respondent's site was aware of the hearing. Furthermore, the applicant has withdrawn his request for reinstatement, which he originally requested in his reference. In any case, even if we were to order reinstatement, such an order would not require the employer to replace a current employee with the applicant. We are not concerned about the way in which the respondent structures his work force as long as it is not in contravention of the Act. It is our view, therefore, that the notice posted was sufficient.

8. The question of Sumka's status for the purpose of this hearing is answered by Section 1(2) of the *Labour Relations Act* which applies to applications under section 124 of the Act. It reads:

For the purposes of this Act, no persons shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

In addition, the question of whether Sumka is an employee cannot be determined independently of the facts in the reference before us, that is as a preliminary matter. The respondent's position means that no one who believed he or she had been dismissed wrongfully or, indeed, laid off wrongfully, could refer a grievance to the Labour Relations Board. The respondent's objection would require us to decide the merits of the case on a preliminary objection. We are not prepared to do that and therefore are not prepared to find at this stage that the grievor is not an employee and therefore without status to bring the application.

9. The respondent argues that the Construction Collective Agreement does not give recall rights to the union; there is therefore no grievance properly before the Board since the grievance is premised on the right to recall. The applicant bases its case on the allegation that the respondent has contravened Article 5.06 of the Collective Agreement, which protects against dismissal without proper cause, and on section 5.01(7) which requires the employer to exercise its rights fairly and reasonably. The applicant says that the respondent has acted in such a way towards the grievor that the grievor had an expectation of certain treatment; the history of the respondent's relationship with the grievor has given the grievor reasonable expectation of recall. Effectively, the respondent's position is that even if the allegations made by the applicant were true, there could be no finding by this Board that the respondent had contravened the collective agreement. This Board has the power to determine its own procedure, pursuant to section 102(13) of the Act. Accordingly, in our view, the Board may establish its own standards establishing when it will refuse to hear a case on the merits. Without suggesting that these provide the only test, we consider the principles recently set out by the Supreme Court of Canada in *Operation Dismantle et al v. Her Majesty the Queen et al*, [1985] 1 S.C.R. 441 relevant to the circumstances under which this Board should dismiss an application on a preliminary objection. In that case, the appellants sought a declaration that the testing of cruise missiles in Canada violated section 7 of the *Canadian Charter of Rights and Freedoms*. They also sought an injunction and damages. Mr. Justice Dickson (as he then was), Estey, McIntyre, Chouinard and Lamer, JJ. concurring, held that the appellants' statement of claim should be struck out and the appeal dismissed. His Lordship stated:

If the appellants are to be entitled to proceed to trial, the statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights under s. 7 of the *Charter*. I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the *Charter* is simply too uncertain, speculative and hypothetical to sustain a cause of action.

Mr. Justice Dickson adopted the relevant principles of determining when a statement of claim may be struck out, as articulated by Wilson J. although he did not adopt all of Madame Justice Wilson's reasoning. Wilson, J. stated that "[t]he facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable course of action, i.e. a cause of action 'with some chance of success' ... [reference omitted] or, ... [reference omitted] is it 'plain and obvious that the action cannot succeed?'. In our view, the facts as pleaded, which are based upon a lengthy history of layoff and recall of the grievor, may ground a grievance "with some chance of success". In our view, it is not "plain and obvious" that the grievance cannot succeed. Therefore, we are not prepared to dismiss the application at this stage of the proceedings.

10. The respondent further objected on the basis of “timeliness” of the grievance. The Construction Collective Agreement states that an employee who believes his rights under the agreement have been violated must inform the employer and the union within 5 days of the violation and the complaint will be treated as a grievance. Counsel for the respondent referred us to Article 29:01 which states that where “a grievance concerning the interpretation, application, administration or alleged violation of this Agreement and including any question as to whether the matter is arbitrable which is being properly covered through all the steps of the Grievance Procedure” and which has not been settled will be referred to a board of arbitration at the written request of either of the parties“ which he argued is a “forfeiture“ provision. In any case, it seems clear that the 5-day time requirement is mandatory: *Re International Union, United Automobile, Aerospace & Agricultural Implement Workers of America et al and Massey-Ferguson Industries Ltd. et al* (1979), 230.R. (2d) 56 (Div.Ct.). Thus the grievance is properly before us only if this is a proper case to extend the time limits or if it can be shown that the respondent and the union waived the limits. The applicant’s counsel argued that the respondent had waived the limits, since he claimed that the parties have been discussing this issue “on and off“ and that the respondent did not raise an objection when notified of the grievance through the applicant’s letter to the Board dated February 25, 1986 applying for a referral of the grievance to the Board. The respondent’s counsel claims that the February 25, 1986 date is the first that the respondent has heard of the grievance. We are not prepared to find that the respondent waived the time limit at this stage of the proceedings. However, we note that in *Lummus Company Canada Limited and The Ontario Erectors Association*, [1976] OLRB Rep. Jan. 980, the Board held that section 124 permits the applicant to refer a grievance to the Board regardless of any provisions in the collective agreement: “the plain intent of section [124] of the Act is to establish a dispute settling mechanism separate and apart from any grievance and arbitration procedure provided under the terms of the subsisting collective agreement“ On this view, section 44(6) of the Act, which permits the Board to “extend the time for the taking of any step in the grievance procedure under a collective agreement“ if it is satisfied that “there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension“, and which is incorporated into section 124 of the Act, relates to the timeliness of the filing of a reference after delivery to the other party “or at any stage of the grievance procedure if pursued under the terms of the agreement“. Here the union has chosen the alternate statutory route and there has been no delay between delivery to the respondent and filing of the grievance. This approach to the effect of section 124 was approved by the Ontario Divisional Court in *The Ontario Erectors Association and Sheaffer-Townsend Limited v. International Union of Operating Engineers, Local 793*, (unreported), dated February 19, 1980. However, even if section 44(6) were intended to refer only to the terms of the collective agreement and the applicant is required to conform to those terms (that is that section 124 provides a supplementary, not alternative, method of grievance resolution), upon consideration of all the material before us, including submissions of the parties, and in particular taking into account the nature of the case, we are satisfied that there are reasonable grounds for extending the time period in section 27:01 of the collective agreement and that this is a proper case for so doing. In any case, since in our view the timing of the violation, if a violation has occurred, is best determined on the evidence adduced on the merits of the case, since the applicant’s theory of the case is that Sumka has been subject to dismissal by not being recalled as he had previously been according to the employer’s past practice, we would be most reluctant to dismiss the case on preliminary objection on the basis of delay. For all the above reasons, we are not prepared to dismiss the matter at this stage of the proceedings.

11. After the Board announced its rulings on the preliminary matters, counsel for the respondent objected that with respect to his preliminary objections relating to notice, the status of Sumka and the 5-day limitation period, he had not been able to make representations of fact. He submitted that the Board could not properly make determinations in these matters without such

facts. The Board is of the view that we had sufficient facts before us, derived from submissions of counsel for both parties, to make the appropriate determinations. In addition, it must be noted that counsel for the respondent raised all preliminary matters and at no time prior to the Board's rulings, did he indicate that he wished to raise further facts or to introduce evidence on any of these matters. Had he done so, the Board would have obviously permitted whatever evidence or further submissions on any of the matters were necessary in order to ensure a full hearing on any of them. In the event, it is our view that both counsel were permitted ample opportunity to make submissions and we note that counsel for the respondent did not articulate any concern about additional submissions until after we had made our rulings.

12. Accordingly, this matter will proceed on its merits and is referred to the Registrar for scheduling continuation of the hearing on July 2nd and 3rd, 1986, upon agreement of the parties, before this same panel.

2742-82-R International Brotherhood of Electrical Workers Local Union 1687, ("I.B.E.W. Local 1687"), Applicant, v. **Kidd Creek Mines Ltd.**, Respondent, v. **United Steelworkers of America**, ("the Steelworkers"), Intervener

Bargaining unit - Certification - Charter of Rights and Freedoms - Constitutional Law - Whether electricians in mining company's maintenance department constituting appropriate unit - Review of Board's general approach in making bargaining unit determinations - No practice in mining industry of separate bargaining units for classifications of skilled employees - Limits on employees' freedom of association reasonable - Application for certification dismissed

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *J. A. Ronson* and *P. J. O'Keefe*.

APPEARANCES: *L. Steinberg* for the applicant; *F. G. Hamilton, Q.C.* for the respondent; *Keith Oleksiuk* for the intervener.

DECISION OF THE BOARD; June 13, 1986

I

1. This is an application for certification in which the IBEW seeks to represent a bargaining unit composed of 106 electricians working in the company's maintenance department. The union claims that this bargaining unit is appropriate on two bases:

1. That it is a "craft unit" which is *deemed* to be appropriate under section 6(3) of the Act; or, alternatively,
2. that the electricians are a separate and distinct grouping of employees with a unique community of interest, so that they would constitute an appropriate bargaining unit even under the broader discretionary provisions of section 6(1).

The relevant provisions of the Act are as follows:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

...

(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

2. In a decision of the Board dated March 23, 1984 [reported at [1984] OLRB Rep. March 481], the Board reviewed the union's evidence and representations, and concluded that the union was not entitled to a "craft unit". The Board then directed the Registrar to relist the case for the purpose of considering the union's alternative submission. Since the parties were unable to agree on the relevant facts, the Board conducted further hearings, in Timmins, to explore the areas in dispute. Final argument was concluded in Toronto.

II

3. By way of introduction we might reproduce here certain findings made by the Board in the earlier decision:

3. The respondent is a mining company which has carried on business in Ontario, under various corporate names, since 1966. The operations with which we are concerned are located in the City of Timmins, and consist of a mine site in Kidd Township, and a metallurgical complex in Hoyle Township interconnected by a 32 mile railway operated by the company. The mine site is a base metal mine extracting a variety of ores. The ore deposit was originally an open pit operation but now consists of two underground shafts. The ore is transported by rail to a metallurgical site for crushing, milling, refining and smelting, in a large modern complex that includes laboratories and office buildings. The company's facilities are among the most advanced in the world. Its production equipment is complex and highly sophisticated.

4. The Timmins operation has an employee complement of about 2,800, split equally between the two locations. There are approximately 800 persons employed in the maintenance function, of whom 106 are electricians. The vast majority of those electricians have a provincial "certificate of qualification". A number also have specialized electronics training beyond that required for the basic certificate of qualification, as well as certain "cross trades" training in skills typically used by other tradesmen.

5. Apart from electricians, the company employs in its maintenance function, large numbers of other skilled tradesmen, including: millwrights, welders, pipe/gas fitters, plumbers, machinists, carpenters, painters, masons, etc. In addition, the maintenance department includes numerous semi-skilled and unskilled classifications as well as various technicians, technologists, quality control personnel, expeditors, planners, engineers, clerical and supervisory staff. Given the nature of the maintenance function, electrical crews will regularly work side by side with other tradesmen or employees in the maintenance department. The electricians work throughout the entire operations. They may receive direction from any number of foremen. The electricians report primarily, but not exclusively, to electrical foremen with the same background as themselves.

These findings were explored in greater depth in the second phase of the hearing, which focused specifically on the electricians' duties, and their relationship with other skilled and unskilled mem-

bers of the company's labour force. The Board heard from several of these electricians, working in various parts of the company's operation, who testified, in some detail, about what their duties entailed, and the other employees with whom they were associated in their work. We do not think that it is necessary to reproduce those details here. It is sufficient to sketch in an overview.

4. The maintenance department is an administrative division within the company's organization, responsible for both "preventive" maintenance and emergency repairs. It is an important responsibility. The enterprise is highly capital intensive and employs some of the world's most sophisticated mining technology. Any equipment breakdown can result in lost production and can be extremely costly. It may also pose a safety hazard.

5. The electricians do *not* constitute an administrative subdivision within the maintenance department, nor are their terms and conditions of employment much different from those of other tradesmen. There is a common policy with respect to overtime, vacations, holidays and other fringe benefits. There is a common wage progression or "code system" for all skilled trades. The electricians share locker areas with other workers and wear the distinctive red helmet which is used by all maintenance department employees. The electricians often work in common shop areas which they share with other trades - although their portion of the shop may be subdivided or dedicated to their own use, tools, and testing equipment.

6. The various tradesmen are divided into crews, which are loosely referred to as "mechanical" or "electrical" crews. The composition of the crew depends upon the requirements of the area in which the crew is located. For example, according to Wayne Prout, an electrician in the smelter area, the "electrical crew" in the smelter consists of approximately 12 electricians, 6 gasfitters, 2 air conditioning mechanics and one (unskilled) lamp changer.

7. In general, the electrical crews do not consist solely of electricians, nor are the electricians the only tradesmen who work with electrical circuitry or require some knowledge of electricity to carry out their tasks. High voltage electrical problems are always handled by electricians, but between twenty-five and sixty per cent of the work of a gasfitter (depending on location) is electrical in nature, involving circuits, controls or switches operating on 110 volt lines. A number of millwrights have been trained in basic electricity to facilitate the performance of their work. Instrument technicians also work with low voltage electrical and electronic control systems. So do diesel mechanics who repair diesel locomotives and must occasionally repair the locomotive's electrical system. And, of course, the automated process equipment often involves a mixture of electrical, electronic, pneumatic or hydraulic control devices which may necessitate the attention of an electrician, instrument technician (mechanic), millwright or plumber, depending upon the nature of the problem encountered or the maintenance operation to be performed.

8. The work of these tradesmen is necessarily interrelated, and in the planning of maintenance work, there must be close co-ordination of the tasks performed by the various trades. To achieve this, planning offices have been set up in various parts of the company's operation. Each week there are planning meetings where the maintenance and operating supervisors, together with the area planner, set the work priorities for the following week. A central clerical group performs the necessary daily administration and "paperwork" for the entire maintenance department, and there is a fairly standardized system of work orders and authorizations. The maintenance department is, and must be organized in a manner that permits flexibility and the disposition of whatever manpower is necessary to resolve any problem which may arise, be it a major shutdown, overhaul, or an emergency repair. The electricians are an integral part of a joint maintenance/repair effort.

9. Wayne Prout, a union witness, confirms this general impression. As we have already mentioned, Mr. Prout is an electrician who currently works in the smelter. He is a "planner" for

the upcoming work of the electrical crew (defined above), and works closely with his counterpart from the mechanical crew (millwrights, welders, pipefitters) to plan the maintenance schedule and co-ordinate major repairs. He cited, as an example, the overhaul of a furnace which, at various times, required the efforts of electricians, gasfitters, millwrights, welders, riggers, refractory workers and labourers.

10. Mr. Prout explained that once a job starts, all the trades have to work together in a pre-planned sequence to dismantle then reassemble the equipment. Since time is of the essence, there has to be close co-operation and liaison between the various tradesmen and trade groups. When asked how this arrangement differed from the “mixed crew” approach used in the most automated part of the refinery known as “line 5”, Prout testified that he really had no answer, although he thought that, perhaps, the mixed crew would be more harmonious. He indicated that, from time to time, there were “flareups” between electricians and other trades as to the proper division of work between them, but testified that he “couldn’t follow” counsel’s question about whether there was a rigid division between the work jurisdiction of the various trades. Mr. Prout asserted that the electricians make up a unique and independent grouping of the respondent’s employees, but he acknowledged that the body of work assigned to, or performed by, electricians is sometimes a matter of controversy. Even in an unorganized work force, there can be jurisdictional disputes.

11. This issue is underlined by the evidence of Andre Lapointe, another electrician who has worked at the metallurgical site for 15 years. Lapointe said that he and another electrician on his crew routinely do their own welding and metal fabricating. He considers welding and metal fabricating to be an ancillary part of the electricians’ trade. He acknowledged, however, that the welders do not accept that characterization. They are less than pleased when they discover that what the welders regard as “their work”, is being done by electricians.

12. Wayne Prout confirmed the company’s general proposition that electricians are usually, but not always, supervised by electrical foremen. There are electrical foremen on duty in the smelter during the day shift, but on the evening shifts, the electricians and others on the electrical crew report to the mechanical foreman, who establishes job priorities and allocates employees to them. Prout also said that two apprentice electricians in the motor repair shop report to the mechanical foreman. At the Owl Creek mine site, electrical and mechanical personnel both report to the production foreman. On the underground crew on the off-shifts, electrical and mechanical tradesmen report to the mine captain.

13. Nor are the company’s supervisory staff segregated along trade lines. Henry Romanowski, an electrician, is refinery maintenance foreman. He supervises a crew of approximately 8 millwrights, 6 electricians, one pipefitter, one welder, one “lube man” and a shifting number of gasfitters. In the refinery, Daryl Mousseau, an electrician by training, performed the functions of both electrical and mechanical foreman. On “line 5” there is even closer integration of the maintenance tradesmen who, in recent years, have been combined in a single crew reporting to the production foreman.

14. Mark MacDonald, an electrician on “No. 2 underground crew”, described another example of the necessary co-operation of a variety of the respondent’s skilled and semi-skilled employees. He testified that the inspection and repair of the hoisting equipment necessarily involves the hoistman, and typically involves electricians and millwrights working together. For example, if the millwright requires the bypassing of a safety device, the hoistman and electrician are both involved, and any major breakdown or repair is likely to require the attention of several trades and some unskilled employees to perform general labour work. These employees have to work together co-operatively “so they won’t be bumping heads” as Gerry Hantske later put it in

his evidence; or, to adopt the phrase of Mark MacDonald, "if you don't work together [the equipment] will be down twice as long". Indeed, virtually every major repair involves the attention of several trades, and probably the process operator in an effort to diagnose the problem. As Mr. MacDonald indicated, there is always a bit of "jostling" about just what the problem is and how it should be resolved.

15. We do not think that we need multiply the examples. The union's submission that there is little "interface" between electricians and other employees when they carry out their work, is totally without foundation, and is not borne out by the testimony of the union's own witnesses. No doubt electricians have certain skills and perform certain tasks not typically shared by others. So do millwrights, welders, gasfitters, plumbers, machinists, carpenters, masons, etc. But the suggestion that the work situation or employment relationship of electricians is somehow unique, is simply not supported by the evidence. Electricians are an integral part of the maintenance team. Their functions complement and overlap with those of other tradesmen, and both their terms and conditions of employment and job horizons are similar. As the Board indicated in its first decision, there is no collective bargaining practice supporting the kind of unit the union here seeks. It does not reflect existing bargaining patterns or structures.

16. We have also weighed, with interest, the testimony of Eric Belford, a mining engineer and the company's vice-president of mining. Mr. Belford explained that in the current economic climate the mining industry is under severe price and cost restraints. It is imperative to enhance productivity if the company and the Country are to remain competitive on the international base metals' market. That requires innovation, automation, flexibility, and an increasing concern with employee productivity and the development of "human capital". In Mr. Belford's opinion, old organizational notions and the job designs of 20 or 30 years ago have now become obsolete. Fixed boundaries between work areas, trades, or departments are inconsistent with the demands of modern technology, and also with the needs of a better educated work force which, he is convinced, can respond to the challenge, and benefit from broader training or work experiences. That is why the company has made a variety of advanced or cross-trades training opportunities available to its tradesmen even though, for the most part, these courses have been offered on a voluntary basis. That is why the company has attempted to restructure its work crews to reflect the new technological reality - for example, by offering electricity courses to millwrights, by offering training in programmable controllers to millwrights and electricians, by changing the composition of the crews and on "line 5" by formally introducing a "mixed crew", and by removing the instrument technician from the engineering department and making them part of the maintenance department.

17. The employer urges the Board not to accept a bargaining unit or sanction a bargaining structure which inhibits its ability to respond to changing technology or the dictates of the market place. The employer repeats the arguments which it made in the first phase of the hearings and which are summarized at paragraph 53 of the first Board decision:

53. The employer stresses the statutory objective of orderly collective bargaining which, it argues, requires a bargaining unit structure which will minimize industrial conflict. In the employer's submission, fragmentation of its work force would create artificial barriers inhibiting cross-trades training, promotion, flexible work practices, and the introduction of necessary technological change. With an integrated work force of employees working in co-operation with one another, it makes no sense to treat one trade as if it were a watertight compartment, or to ignore the real problems - jurisdictional disputes, picketing problems, strike-induced layoffs, etc. - which would inevitably follow the creation of an island of collective bargaining in a sea of employees with overlapping or functionally related skills. The employer asserts that craft unions and units are obsolete in a modern industrial society, and "as proof of the pudding" points to the evidence in this case which was replete with examples of common bargaining with other skilled and unskilled employees, and diluted craft bargaining units. In the employer's submis-

sion, section 6(3) is a historical anomaly and an exception to section 6(1) which should be strictly construed. The employer argues that harmonious employer-employee relations demand it. In the employer's submission, the Board should not establish a unit which is inappropriate for collective bargaining if a plausible interpretation of section 6(3) will avoid that result, nor should it lightly extend balkanized bargaining structures beyond those industries in which they have historically existed.

The company argues that the unit proposed is not "appropriate for collective bargaining" and having failed to meet the statutory requirements of section 6(3), the union should not be permitted to secure the same result "by the back door".

18. Before determining whether the union's proposed bargaining unit is appropriate pursuant to section 6(1) of the Act, it may be useful to briefly review the Board's general approach in making bargaining unit determinations. That approach has been considered and elaborated in a number of recent cases to which we might usefully refer.

III

19. In *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the union proposed a bargaining unit consisting of hospital "service workers" (cleaning, housekeeping, laundry, maintenance employees, etc.). Service units of this kind are quite common in Ontario hospitals and typically exclude "technical" or "paramedical" employees who either remain unorganized or are grouped together in their own separate bargaining unit. The problem in *Hospital for Sick Children* was where to draw the line between the general "service" and "technical" bargaining units; and, to this extent, the issue is quite different from the one we face. In *Hospital for Sick Children* there was no problem of potential fragmentation because the disputed employee group would inevitably be assigned to one bargaining unit or the other, whereas, in the instant case, the potential for fragmentation of the bargaining structure is a principal concern of the respondent. Nevertheless, certain of the Board's general comments about bargaining unit determination are equally apposite here:

12. Prior to the passage of collective bargaining legislation in the early 1940's, there was no prescribed mechanism for the acquisition of bargaining rights. If a group of employees sought to form or join a trade union, and if they had sufficient bargaining power, they were able to compel their employer to meet and bargain. However, the only means of achieving recognition was to threaten a strike. A union had no statutory right to bargain on behalf of its members, and no statutory obligation to represent anyone else. Even if a bargain was struck, the agreement was not, in itself, a binding and enforceable contract. Its enforceability depended upon the parties' economic strength.

13. In 1943, borrowing from American experience, the Legislature passed the *Ontario Collective Bargaining Act* (S.O. 1943, c.4). The new legislation provided a process whereby a trade union could become the exclusive bargaining agent for the employees in a "unit of employees...appropriate for the purposes of collective bargaining" which could be an "employer unit, craft unit, plant unit, or a subdivision thereof" (see section 13(5a)). Over the years, that language has not changed very much. Section 1 and 6 of the present *Labour Relations Act* read (in part) as follows:

...

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its tradi-

tional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

15. Now obviously, the determination of the appropriate bargaining unit has immense practical and tactical significance. The unit determines the constituency within which the union must establish majority support if there is to be any collective bargaining at all. To put it another way, the unit determines the group of employees whose support must be solicited by their fellows if the objective of collective bargaining is to be achieved. A union cannot seek certification solely for those who have opted to join it. It is required by law to establish majority support in what *this Board* determines is an appropriate unit, and that may not be so easy to predict - as the present case indicates. Moreover, to the extent that the contours of the bargaining unit are unclear, there will be uncertainty about precisely how employees should go about organizing themselves in order to conform with what the law may require. There will also be the prospect of litigation, cost, and delay which may prejudice both the applicant union and the employees it seeks to represent (see the remarks of Laskin, J.A. in *Nick Masney Hotels Limited*, (1970) 13 D.L.R. (3d) 289; 70 CLLC 14,010; and those of Estey J.A. (as he then was) in *Re Journal Publishing Co. of Ottawa et al.*, and *Ottawa Newspaper Guild et al.* [1977] 1 ACWS 817). Cost and delay will also be of concern to the employer, and to employees whose wages may be temporarily "frozen" by section 79 of the Act even if they are ultimately excluded from the bargaining unit. The situation is exacerbated in the instant case where the bargaining unit is large, and both parties have experienced some difficulty determining the precise perimeter of the unit, and how (if at all) it can be meaningfully and consistently distinguished from the lower levels of employees working nominally (in the employer's terms) in "technical" job classifications.

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17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only

viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

Similar views were expressed ten years before in *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7:

10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, 1969 June OLRB Monthly Report 340.

11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining." In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February OLRB Monthly Report 103, and in the *Board of Education for the City of Toronto* case, *supra*.

12. The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them." This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*.

20. This concern about fragmentation - the division of the employee complement into a number of potentially competing collective bargaining units represented by different unions - was addressed squarely in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459. There two unions were attempting to organize differently described, but overlapping proposed units of paramedical employees, and the initial problem was to determine the description of the appropriate unit. The Board recognized that in the particular environment of a public hospital, pharmacists, psychologists, physiotherapists, social workers, nurses, orthotists, medical librarians, speech pathologists, etc., all had an arguably distinct identity stemming from such factors as their specialized training, outside professional associations, or participation in a particular hospital department; moreover, hospital departments typically have a specialized focus and, from an employee perspective, can be quite insular. There may be a hierarchy of specialization and potential opportunity for advancement within a particular department, but there may be less likelihood of a transfer, promotion, or progression up the job ladder from one department to another (see also the discussion in *Hospital for Sick Children*, at paragraphs 26-28). In this context each subgroup of employees, and each department could plausibly claim a distinct community of interest; however, the Board made it clear that this did not mean that each of these groupings would constitute a separate bargaining unit for collective bargaining purposes. Such balkanization of the bargaining structure would create serious administrative problems for the hospital which could potentially face a large number of bargaining units and trade unions. Nor was the Board persuaded that technical, paramedical, para-professional, or professional employees should be distinguished for collective bargaining purposes, even though there were obviously important distinctions between them based upon their level of education, responsibilities, degree of independence, and how far they had travelled along what the Board described as the "road to professionalization". The Board was of the view that, for collective bargaining purposes, they could all comfortably exist within one broadly-defined paramedical bargaining unit. While their skills, training, and professional interests might suggest separate bargaining units, the Board found that they were part of an integrated health care team and the Board was unwilling to countenance a collective bargaining structure with perhaps two dozen separate bargaining units and a number of different trade unions.

21. In the earlier *Kidd Creek Mine* decision (at paragraph 50) the Board expressed similar concerns, citing the analysis set out in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250. We will not repeat those passages here, for what the Board was saying in *Kidd Creek No. 1* and *Bestview* is nothing new. About a year before, in *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, a panel of the Board observed:

13. The concept of a bargaining unit performs two quite distinct functions in labour relations law. In order to be certified, a trade union must enjoy the support of a majority of employees in a bargaining unit. The unit serves as an electoral district in this setting. After a union is certified, the bargaining unit found by the Board to be appropriate strongly influences the conduct of collective bargaining. Although the parties sometimes vary this unit description, it is frequently simply reproduced in the recognition clause in a collective agreement.

14. A trade union may experience unsurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRB 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade

union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited*, *supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been "hard pressed" not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

22. To take another example (which, in fact is not so far-fetched given recent collective bargaining developments), one has only to project the proposition here advanced by the union upon the work force of a university. Economists, sociologists, political scientists, philosophers, geographers, psychologists, anthropologists, historians, mathematicians, chemists, physicists, biologists, astronomers, etc. - all in separate departments with specialized education and interests - would be entitled to a separate bargaining unit. And virtually every large industrial organization could be subdivided, for collective bargaining purposes, along departmental lines or in accordance with job classifications which need not fulfill the formal "craft unit" requirements contemplated by section 6(3) of the Act. So could any public hospital where pharmacists, psychologists, social workers, etc. have at least as much claim to a separate identity as the electricians here - not to mention electricians or plumbers in a hospital's maintenance department who are currently included in the service unit, or the myriad "technicians" spawned by the developments in medical technology. For anyone concerned about promoting collective bargaining stability and minimizing competitive bargaining, inter-union rivalry, jurisdictional disputes, and industrial conflict, the possibility of a multiplicity of bargaining units is not one to be welcomed.

23. For many years the Board has been exceedingly reluctant to define bargaining units on the basis of employee classifications or employer departments, because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W. R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Roscoe Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry where departmental unionization has existed in the extreme (based initially upon craft distinctions which predated the current legislative framework), the Board has indicated that it might be less receptive to a continuation of these entrenched organizing patterns of the past, because computerized technology had revolutionized the structure and content of work in the newspaper business. (See *Hamilton Spectator*, [1981] OLRB Rep. Aug. 1177). Most recently, in *T. Eaton Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board reiterated its view that dividing an employer's business into bargaining units based upon departments would not be conducive to orderly collective bargaining. In *Eaton's*, for example, the Board refused to exclude a specialized department of computer salesmen from a broader "sales" bargaining unit, even though their skills, method of payment, and likely career opportunities were somewhat different from those of the other salesmen:

6. In the present case, some differences do exist between the sales staff of the Business Centre and those of other departments. But these are differences essentially in degree, and the most

distinctive of the Business Centre's working conditions are not without parallels, as discussed above, in some or other of the sales departments already encompassed within the agreed-upon units for this store. Nor does an apparent lack of interest in lateral transfers form a compelling basis for compartmentalized bargaining: the same could be said for many of the technically-skilled and higher-paid departments within an industrial production facility, yet the Board has not viewed as appropriate a proliferation of self-contained skilled-trade or similarly specialized units within a plant. While the question before us in the present application is whether to accede to the request of the employer to allow this one small group to remain outside the broad-based sales unit, viewing the matter from the point of view of its corollary better illustrates the problem. If the 5-man sales unit of the Business Centre is appropriate for exclusion from the broader sales unit now before us, it presumably would also be found appropriate as a self-contained bargaining unit at another store, where *no* other union organizing may yet have taken place. That is not the kind of piecemeal organizing or collective bargaining which the Board would be anxious to foster in this industry. While the needs of the Centre may require certain accommodations, we are not persuaded on the facts that those accommodations cannot be made within the broader context of the varying specialized and commissioned/non-commissioned sales unit.

24. The suggestion that these Board concerns are only hypothetical is refuted by the Board's recent experience in the pulp and paper industry where, as we noted in our earlier decision, craft units were established before the passage of the first *Labour Relations Act* and therefore continue to exist in an industrial context. But these tradesmen have not been immune from the vicissitudes of mechanization and technological change, which erodes their claim to a body of work exclusively within their own job territory, and exposes that work to claims by other employees (instrument mechanics/technicians, for example) represented by the broader-based industrial unions. The litigation of those competing claims has already consumed days and days of hearings before another panel of the Board.

25. Concerns about the consequences of fragmentation are not idle speculation, nor have they escaped attention in other jurisdictions. Because of the problems associated with the proliferation of bargaining units in industrial enterprises, the policy in a number of provinces has now shifted away from the recognition of craft units or other similar subdivisions of employees. Following the recommendations of the Woods Task Force in 1968, Parliament amended the *Canada Labour Code* to delete the provisions (similar to section 6(3)) protecting craft bargaining units, and the circumstances in which an existing unit can be splintered are now closely confined (see *Feed-Wright Limited*, [1979] 1 Can. LRBR 296; *Atomic Energy of Canada Ltd.* (1978), 1 Can. LRBR 92; and *Cablevision Nationale Ltee* (1979), 3 Can. LRBR 267 and cases referred to therein). In British Columbia, craft units can be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in a manufacturing context. Even in the construction industry where craft unionism reigns supreme, the Ontario Legislature has intruded. In 1978, the Legislature imposed a system of province-wide bargaining by trade in place of the fragmented system of employer by employer bargaining which existed before. There is now a developing consensus that orderly collective bargaining is not enhanced by fragmenting an employer's work force into a number of competing bargaining units (for a thoughtful analysis of the issues see Paul C. Weiler: *Reconcilable Differences: New Directions in Canadian Labour Law*, Carswell's 1980 at pp. 151-178). Finally, since this Board may not have the power to later consolidate or rationalize the bargaining structure (as the Federal and B.C. labour boards can do), we should be particularly careful in fashioning the bargaining unit in the first place.

26. We do not think it would serve any useful purpose to further clutter these reasons with more long quotes from other Board decisions. We have included these references only to underline the consistency of the considerations and concerns which have influenced the Board for many years

- considerations and concerns which we must largely abandon if we are to accept the bargaining unit proposed by the union in the instant case.

IV

27. There is no doubt that electricians, as a group, have certain skills and perform certain work which is different from that of other employees or other skilled tradesmen. But there is nothing unique about that. The same can be said of each of the skilled trades, and, indeed, many of the skilled employees in classifications which the IBEW would not describe as a traditional "craft". This does not mean that the electricians share a separate community of interest *for collective bargaining purposes or that, from a collective bargaining perspective*, they would be a separate "appropriate" bargaining unit. Indeed, what is striking about the evidence is the *absence* of employment characteristics unique to electricians which would support their claim to a separate unit. And against such claim one must balance the employer's concern about efficiency and the real likelihood of problems arising from fragmentation. While counsel may characterize those problems as "hypothetical", the Board's experience suggests that they are real.

28. Obviously, on its most mundane level, one can say that electricians work with electricity - but so do gasfitters, instrument technicians, and, to a lesser extent, millwrights or locomotive mechanics. Electricians work with programmable control and monitoring devices, but so do instrument technicians and some members of the mechanical crews. Electricians have certain training which is unique to their trade, but the company has introduced (currently on a voluntary basis) a programme of cross-trades training of which a number of tradesmen have already taken advantage, and the trend is towards more such training in order to improve the employees' ability to work in close co-operation on the increasingly sophisticated equipment. The diagnosis and resolution of repair problems already involves a joint effort of various trades.

29. The work of the various trade groups cannot be divided into watertight compartments - as evidenced by the composition of the electrical crews and the testimony of various union witnesses who told the Board about their experience with competing jurisdictional claims, debates about the proper diagnosis of a problem, or the division of responsibility for resolving it. To cite but one example: we are sure that it would come as something of a surprise to the United Association of Journeymen Plumbers and Pipefitters of North America ("UA") to hear an electrician assert that welding is part of his trade. But in the context of an industrial establishment, it may well make sense to have tradesmen who are flexible and able to perform a variety of duties which would not ordinarily be regarded as part of their historical craft jurisdiction, and, it would not make collective bargaining sense to structure a bargaining unit which restricts that flexibility.

30. The electricians share the same work situation as other employees and most of the same terms and conditions of employment. Their wage progression system is the same as that for other skilled trades. The wage rates themselves are not radically different. The source of work is also the same, and must be co-ordinated by administrative, clerical, and supervisory staff to ensure that all of the skilled employees are working together effectively. Electricians are not supervised exclusively by other electricians and, conversely, electricians may be promoted to managerial positions where they will be supervising a variety of skilled employees. Neither the company's organizational structure, nor the composition of the electrical crews demonstrate an independent identity for electricians or any unique employment or collective bargaining interests. On the contrary. If the applicant were to be certified for a unit of electricians, it is difficult to envisage many collective bargaining concerns which they do not share equally with their fellow employees.

31. If general policy or community of interest considerations do not support the IBEW's proposed bargaining unit, what of the organizational concerns mentioned in *Ryerson Polytechnical*

Institute, supra, and such cases as *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330; *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250; and *Photomat Canada Ltd.*, [1979] OLRB Rep. April 306? In each of these cases the Board considered whether, in determining “appropriate bargaining unit”, the Board should take into account the organizing problems encountered by employees in a previously unorganized industry or the barriers to organization arising from the characteristics of particular industries. In *Canada Trustco Mortgage Company*, the Board commented:

27. In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all. As was said by the British Columbia Labour Relations Board in *Woodward Stores Vancouver Limited*, [1975] 1 C.L.R.B.R. 114, quoting the earlier *Insurance Corporation of British Columbia (No.2)* decision of the same Board:

“However, clearly one can't have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union's representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stipulate opposition to a representation campaign [sic]. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.”

(The same view is expressed by The Canada Labour Relations Board in *Canadian Pacific Limited, Vancouver, B.C.* (1965), 13 Di 13 at 31 and applied by the National Labour Relations Board in *Hawaii National Bank, Honolulu*, 212 N.L.R.B. No. 82 (1974) at 578). In assessing the viability of a unit of employees for collective bargaining, the Board cannot disregard the threshold question of that unit's very ability to organize and exist. That realization is one of the considerations that underlie the Board's policy generally to restrict the scope of a bargaining unit to the municipality in which that part of the employer's operations are located.

32. These observations or concerns have little or no application to the present circumstances. This is not a situation like that addressed by the Board in *K-Mart* or *Canada Trustco*, where employer resistance or the inherent difficulties of organizing a number of separate locations meant that if the only appropriate bargaining unit was one encompassing all of those locations, there would likely be no collective bargaining at all. The respondent's employees have not, heretofore, indicated any pronounced appetite for collective bargaining, but the mining industry itself is highly organized, and as counsel for the intervener points out, the employees are, almost without exception, organized into broadly-based industrial bargaining units. There has been no practice in the mining industry (or, indeed, most industrial enterprises) of separate bargaining units or representation for classifications of skilled employees. For more than forty years such employees have been routinely included in industrial bargaining units. The evidence does not demonstrate either that those units are unduly difficult to organize, are ineffective, or that they subordinate the special interests of the various skilled tradesmen who are included. In fact, at about the same time as the IBEW was proceeding with the present application, the International Union of Operating Engineers - also a craft union like the IBEW - successfully organized an “all employee unit” of workers at Campbell Red Lake Mines. The rejection of the IBEW's proposed bargaining unit description may result in the dismissal of the present application, but that is the result in every case where a union has confined its organizing activities to an employee constituency which does not constitute a unit of employees appropriate for collective bargaining. Certainly there is nothing to suggest that

miners as a group are inherently difficult to organize or that the respondent's employees have remained uninterested in collective bargaining for any other reason than their own individual preferences or the lack of organizational efforts by the IBEW, the Steelworkers, or some other union.

33. We turn, then to the applicant's "charter argument".

V

34. Counsel for the IBEW argues that the electricians (together with certain other employees with whom they are commonly associated in their work) constitute a coherent grouping of employees whose right to engage in collective bargaining should not be limited by the Board's policy prescriptions or definition of the "appropriate" bargaining unit. Counsel asserts that the constitutional right of freedom of association can no longer be limited by such parochial concerns and, to the extent that the Board has imposed such limitations in the past, the practice can no longer be continued. Counsel argues that to require the electricians to seek trade union representation only in a broader-based bargaining unit, limits the employees' freedom to associate and bargain in a group of their own choosing, and compels them to associate and bargain with a larger group of employees who, in the instant case, have indicated no interest in collective bargaining at all. Counsel asks rhetorically: why should the electricians be denied access to collective bargaining with its statutory framework and legal protections, because other employees do not share their interest? As a practical matter, the electricians cannot bargain collectively without a certificate issued by this Board, but such certificate may be denied them if the extent of their association is not, in the Board's view, sufficiently broad. Counsel urges the Board as a matter of interpretation, to refine its approach to bargaining unit determination to take into account these *Charter* concerns, and as a matter of law, to consider whether the Board can circumscribe the electricians' right to bargain through the agent of their choice. In counsel's submission, freedom of association guaranteed by the *Charter* involves a right of employee self-determination which cannot be abridged - at least in the absence of compelling public policy considerations which, it is said, are not evident here.

35. The union's argument, with its *Charter* gloss, has a superficial attraction which serves to obscure its real import: it involves a fundamental challenge to the Legislature's right to regulate the structure of collective bargaining, and the Board's ability to shape bargaining units in such a way as will promote orderly, stable and harmonious collective bargaining relationships. If the Board is required to issue a certificate to the IBEW in the instant case, the carefully drafted limitations in section 6(3) of the Act restricting the availability of "craft units" will become virtually irrelevant, and it is difficult to conceive of any employer department, employment classification or employee work group which would not be entitled to their own bargaining unit and separate bargaining agent. In any large industrial, commercial, or public enterprise, there could be dozens of bargaining units and trade unions. These propositions, and their results, raise both analytical and technical difficulties.

36. In the first place, it is by no means clear that "freedom of association" entails the protection of collective bargaining rights, let alone entitlement to any particular bargaining unit or trade union representative. Many of the courts which have considered these issues have held that "freedom of association" means the right to enter into consensual relationships with others; it does not protect either the objects of association or the means of attaining those objects. Neither collective bargaining, as such, nor particular forms of collective action are protected by section 2(d) of the *Charter*. (See: *Dolphin Delivery Limited* [1984], 3 W.W.R. 481 (B.C.C.A.); *Prime et al and Manitoba Labour Relations Board et al.* [1983], 3 D.L.R. (4th) 74 (Manitoba Q.B.); *Public Service Alliance of Canada v. The Queen in the Right of Canada*, 84 CLLC 14,053 (Federal C.A.); *Brick and Brew Holdings Ltd.* (1983), 4 C.L.R.B. (N.S.) 129 (B.C.L.R.B.) and c.f. *The Corporation of the City of Thunder Bay*, [1984] OLRB Rep. July 1032.) Even the more expansive views of the

scope of “freedom of association” enunciated by the Ontario Divisional Court in *Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231, or the Saskatchewan Court of Appeal in *Retail, Wholesale and Department Store Union Locals 544, 496, 635, 955 et al v. Government of Saskatchewan* 85 CLLC para. 14054 do not address the right of individual groups of employees to engage in collective bargaining in a bargaining unit of their own choosing apart from other employees of the same company. That issue was not before the Court; moreover, it is clear that limits on employee access to certification do not necessarily violate the *Charter* (see: *Re United Headwear, Optical and Allied Workers’ Union of Canada, Local 3 and Biltmore/Stetson (Canada) Inc.* (1983), 43 O.R. (2d) 243 (C.A.)). Nor was the court in *Pruden Building Limited and Construction and General Workers’ Union Local 92 et al* (1984) 13 D.L.R. (4th) 584 persuaded that an employer’s freedom of association was improperly constrained by a legislative scheme requiring him to bargain together with other unionized employers. *Pruden* is closer than some of the other cases, but, on balance, there is not much judicial guidance on the issue presently before us - although it has been addressed in at least one earlier Board case. In *The Corporation of the City of Thunder Bay, supra*, the Ontario Board had before it a situation in which there had been an earlier finding that certain “technical” employees, part of a larger office, clerical and technical bargaining unit, had not been properly represented by their union. The technicians requested that the Board give them a separate “technical” employee bargaining unit. Their claim was based not only upon the inadequacy of representation in the past, but also upon their “freedom of association” guaranteed by the *Charter*. They argued that, under the *Charter*, the Board was compelled to give paramount importance to employee wishes, which, in the circumstances would require the Board to “carve out” the unit they sought from the existing bargaining unit. The Board addressed the *Charter* issue as follows:

9. Freedom of association is not the unfettered right to enter into the ranks of a bargaining unit of one’s choosing. While the Board may take the wishes of employees into account in deciding on the appropriateness of a given unit of employees for collective bargaining purposes, it must also consider other factors which are important in the establishment of a sound and viable bargaining structure. That was expressly reflected in the following comment in this Board’s decision of May 4, 1984:

Of paramount concern is the possibility of severing the existing unit of office and clerical employees, or “inside employees”, as they are generally known. In any application for certification it is the obligation of the Board to consider what delimitation [sic] of employees will be suited to collective bargaining as a group. While the Board has noted that it must not necessarily select the ideal bargaining unit designation, it does strive, insofar as possible, to fashion and preserve the most comprehensive unit of employees which will constitute a viable bargaining structure. The wish for self-determination on the part of a group of employees is a factor to be considered among others, but it is not the determining factor in all cases. (*McDonald’s Restaurants of Canada Ltd.*, [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7; *Canada Trustco Mortgage Co.*, [1977] OLRB Rep. June 330 and see also *Parnell Foods Ltd.*, [1969] OLRB Rep. Apr. 38; *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459.)

10. If, as counsel for the complainants implies, the determination of bargaining units is to be determined solely by reference to the preference of a given group of employees (and in this case, in apparent disregard of the contrary wishes of a larger group of employees), the Board’s jurisdiction to determine the appropriate bargaining unit would be reduced to poll-taking. That is not what the Act intends. It is axiomatic that in any disputed case some employees will disagree with the bargaining unit structure established by the Board. That is inevitable. It does not follow, however, that a Board decision rejecting the preference of a group of employees infringes their freedom of association. Nothing in the Board’s decision respecting the bargaining unit limits the freedom of association of any employees.

37. The technical difficulty arises from the limited jurisdiction of a statutory tribunal such as this Board which can only do what the Legislature prescribes, in the manner the Legislature pre-

scribes. We are empowered only to certify the appropriate bargaining unit established pursuant to existing collective bargaining and legal criteria (see: sections 1(3)(b), 6(3), 6(4), 6(5), 12 and 144 of the Act). It is not obvious how the Board could certify what the intervener described as the "Charter Unit"; nor, if the union's analysis is accepted, is it obvious how a union could ever acquire the exclusive right to represent anyone other than its own members, or compel membership by a collective agreement that ultimately depends upon the statute for its binding effect. If the bargaining unit is to depend upon the shifting sands of employee wishes, now bolstered by their constitutional right of "freedom of association", a union's statutory bargaining rights could arguably never extend beyond its established membership base.

38. For the purposes of this decision, we need not explore such problems. We are prepared to *assume* that, to some extent, section 6(1) impinges on the employees' freedom of association. The bargaining unit defines the ambit of the union's exclusive representation rights which the employer is compelled to recognize. Any bargaining unit or voting constituency not based on total employee unanimity will almost certainly include some workers who do not wish to associate for collective bargaining purposes with others, or at all, and the unit definition may well exclude some individuals who would prefer to be included. Such exclusion can result from the Board's determination of what is appropriate, or by operation of law - the exclusion of foremen or security guards for example (see section 1(3)(b) and section 12 of the Act). It does not really matter where or how the Board draws the line. Some employees are always going to be included or excluded against their wishes; and, if one equates freedom of association with the right to bargain collectively (or not) in a group of one's own choosing, there would almost never be a bargaining unit determination which did not infringe upon someone's freedom of association. Nor would the impact of such assumption be limited to the inception of the collective bargaining process. Presumably, a dissatisfied group might also have the right to *dissociate* and form its own collective bargaining unit as the technical employees sought to do in *The Corporation of the City of Thunder Bay*, *supra*.

39. The question though, is whether the Board's determination of the "appropriate" bargaining unit, based upon all of the factors and considerations set out above, can be regarded as a reasonable limitation on freedom of association demonstrably justifiable in a free and democratic society. We are satisfied that it is. It reflects the considered judgement of the Ontario and other Legislatures, and the various panels of the Board, over the years, that have grappled with problems similar to those raised in the instant case. Our own experience, our reading of other Board cases, our assessment of developments in other jurisdictions, and the views of learned commentators, all underscore the importance of the "appropriateness" of the bargaining unit in a regulatory scheme designed to promote orderly collective bargaining and industrial peace. No doubt the *Charter* has ushered in a new era of reflection, and challenge to existing ideas and institutional arrangements, however, we do not think it requires a reversion to the process of "voluntarism" which has marked (some would say plagued) the British system of industrial relations for so many years. The Act promotes and protects collective bargaining rights which did not exist at common law, and may not have any independent constitutional protection. To the extent that the regulatory framework also limits the employees' freedom of association, it is our opinion that such limitation is reasonable, and from the Board's experience and collective bargaining perspective, "demonstrably justifiable".

40. For the foregoing reasons, we do not think that the *Charter* precludes our determination that the unit sought by the IBEW in this case is not appropriate for collective bargaining. We so find. This application for certification is therefore dismissed.

0597-85-U Jean Liebman, Complainant, v. York University Staff Association, Respondent, v. York University, Intervener

Duty of Fair Representation - Remedies - Unfair Labour Practice - Union withdrawing complainant's grievance on assumption that she turned down reasonable offer of settlement by employer - Whether union gave grievance "its honest consideration" - Union's duty to ascertain grievor's version of events prior to acting against her interest - Reinstatement of arbitration of grievance ordered - Order not barring settlement by union in compliance with requirements of s. 68

BEFORE: Owen V. Gray, Vice-Chairman.

APPEARANCES: James Fysche, Charles Campbell and Jean Liebman for the complainant; William A. Harrison, Celia Harte, David Parry and Roderick Bennett for the respondent; D. J. Mitchell, S. Young and J. O'Keefe for the intervener.

DECISION OF THE BOARD; June 27, 1986

1. When this complaint came on for hearing, 50 year old Jean Liebman had been employed for over 17 years by York University ("York") as a secretary in a bargaining unit represented in collective bargaining by the York University Staff Association ("YUSA"). Ms. Liebman's complaint is that YUSA's decision on June 6, 1985, to withdraw her transfer grievance on the eve of hearing by an arbitration board constituted a breach of section 68 of the *Labour Relations Act* ("the Act"), which provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions as the case may be.

2. In 1983, Jean Liebman started complaining - to staff, faculty members, members of York's management and, ultimately, her trade union - that false accusations about her work performance in the Sociology department, where she had been working for all but the first few months of her employment, were being made against her without explanation or justification. With the exception of an apparently disciplinary remark by the department's Chairman, a matter which was resolved after the union intervened, the reaction of the YUSA officials to whom Ms. Liebman made her frequent complaints was that those complaints concerned disputes between bargaining unit employees which could not be dealt with in the grievance procedure under YUSA's collective agreement with York.

3. Ms. Liebman was persistent in pressing her complaints. Eventually, YUSA requested a labour-management meeting, in the hope that this might resolve the situation. The result of the meeting was an agreement that York would engage an outside consultant to review the department. When the consultant completed his review, his report recommended that both Liebman and a supervisor in the bargaining unit be dismissed or transferred out of the department. On November 8, 1984, Liebman was transferred from the Sociology department to a secretarial pool position elsewhere in the Faculty of Arts. She filed a grievance which the union executive, after some initial reluctance, decided it would take to arbitration.

4. In the meantime, following an earlier suggestion by a member of the union's executive that she sue the persons she felt were mistreating her, Ms. Liebman had retained a lawyer, Mr. Campbell, to consider the possibility of a civil action for defamation. The union rejected her

request that it allow Mr. Fyshe, another lawyer in Campbell's office, to represent the union at the arbitration of her grievance. YUSA preferred to use Mr. Harrison, who represents the union on a regular basis. The arbitration of Liebman's grievance was scheduled for hearing on June 7, 1985. As a result of discussions with Harrison, Campbell saw the arbitration as holding more promise for Ms. Liebman than a defamation action. Campbell represented Liebman in discussions with Harrison about the arbitration in the period leading up to the scheduled hearing.

5. Shirley MacDonald was President of YUSA in June, 1985. She testified that the union's executive met on the evening of June 4, 1985, and made a motion that the union would withdraw Liebman's grievance from arbitration if she should refuse a reasonable offer of settlement from York. Although the union thought York would make a settlement offer, according to MacDonald none had been received when this motion was passed. Campbell was told of this motion on June 5th. That day, York made two successive settlement offers. The first was rejected by Ms. Liebman. The second (hereafter referred to as "the offer") resulted from a four-way telephone conversation between Don Mitchell (York's Personnel Director), MacDonald, Harrison and Campbell. Harrison described the offer this way in a confirming letter to Campbell dated June 6, 1985:

The second offer was that Mrs. Liebman will be given three months paid leave of absence after which upon her return she will be offered two positions by York University from which to choose. In addition, her legal costs up to \$1,500.00 will be paid. On top of that an apology will be provided to her and her file purged to her satisfaction. In exchange, the University requests that she provide an undertaking whereby *she will no longer carry on in her battle with the University or her fellow employees.*

[emphasis added]

The emphasized words are Harrison's characterization of that aspect of the offer. Neither he nor Mitchell testified. Campbell and MacDonald both did, and neither said Mitchell used the word "battle". They understood from Mitchell that the University wanted Ms. Liebman to treat the settlement as finally resolving all her past complaints and to refrain from any further discussions of those past complaints with anyone.

6. Campbell arranged to and did meet with Liebman on the evening of June 5th to discuss the offer. Liebman told him she would have to think about it overnight. He told her of the union's position with respect to withdrawal of the grievance from arbitration if she rejected a reasonable offer, and asked her to let him know by 10 o'clock the following morning. For her part, MacDonald spoke by telephone with members of the YUSA executive and told them the details of the offer. By early morning on June 6th, before the call from Mitchell described in paragraph 9 hereof, MacDonald had ascertained that a majority of members of the YUSA executive felt that this offer was a reasonable offer and that the union should withdraw the arbitration if Liebman rejected it.

7. Liebman had doubts about the offer. She was not sure of the University's ability to bring her difficulties to an end. At about half past 7 o'clock in the morning on June 6th, she decided to and did speak by telephone with her local member of provincial parliament, to whom she had never before spoken. In response to her story, which he now recalls only in general terms, Liebman's MPP suggested that she speak to the President of York University, Harry Arthurs. He asked if she would like him to arrange an appointment for her. She said she would. He called the President's office and spoke to a secretary or assistant, who said Mr. Arthurs was out of town but that she would look into the matter and get back to him about his constituent's request.

8. It was not put to Liebman's MPP when he testified before the Board that calling the President should have seemed to him an inappropriate response to whatever Ms. Liebman told him that morning. It was put to Liebman and to Campbell, however, that contact with the President's

office on June 6th was inappropriate because it represented a continuation of “the battle” and that it was an implied term of the offer that “the battle” not continue while acceptance was under consideration. Both denied that there was any implied term that Liebman not speak to anyone at York before deciding whether to accept or reject the offer. Liebman said she agreed to her MPP’s calling to make an appointment for her because, in a meeting with members of YUSA a few months earlier, Mr. Arthurs had said he had an open door policy and that staff should feel free to discuss problems with him. She said the purpose of the proposed meeting was not to continue a battle but to seek assurances that a battle would end. In any event, no meeting could be arranged at that point. Liebman called Campbell just before 10 o’clock to say that she agreed with the settlement in principle, subject to satisfactory negotiation of the form of the University’s apology and the form of her undertaking. Campbell called Harrison’s office shortly after 10 o’clock. He was told Harrison was not in, so he left a message that Liebman had accepted the offer in principle.

9. In the meantime, Mitchell had called MacDonald, told her of the call by Liebman’s MPP to the President’s office and suggested it appeared Liebman had rejected the offer. MacDonald called the President’s office and was told that Liebman’s MPP had, indeed, requested an appointment and that Liebman herself had been contacted to confirm the request. After speaking to Harrison, MacDonald called Mitchell and told him the union was withdrawing Ms. Liebman’s grievance from arbitration. She did so, she said, because YUSA’s executive had decided that should be done if Liebman rejected York’s offer and it appeared to MacDonald that Liebman had rejected that offer. She came to that conclusion without first speaking to Liebman or having Harrison speak to Campbell to ascertain whether the MPP’s call to the President’s office reflected a decision by Liebman to reject the offer. She said she felt that withdrawing the grievance from arbitration was a matter of urgency because the arbitration hearing was scheduled to start the following day. It did not occur to MacDonald to seek an adjournment of the arbitration hearing and it is not at all apparent why the call to Mitchell to withdraw the grievance could not have awaited a call to Liebman or Campbell.

10. When Harrison returned Campbell’s call later that day, he told Campbell that the University had withdrawn its offer because of the call Liebman’s MPP made to the President’s office and that the union had withdrawn the grievance. He later confirmed this advice in a letter to Campbell dated June 7, 1985. I am bound to observe that Ms. MacDonald’s evidence of her conversations with Mitchell was inconsistent with Harrison’s representations to Campbell: in her testimony, MacDonald did not suggest that Mitchell had withdrawn the offer at any point before she withdrew the arbitration. (Although Harrison and Mitchell acted for YUSA and York, respectively, at the hearing of this complaint, neither testified.)

11. This complaint was filed June 12, 1985 and heard January 22 and February 5, 1986. The complainant’s position is that it was arbitrary of the union to act as though she had rejected York’s settlement offer without speaking to her or her lawyer to ascertain whether or not she had. YUSA’s defence is that the failure to do so was, at most, an honest mistake or error of judgment of the sort which does not violate section 68. YUSA also argues that if there was a breach of section 68, Liebman suffered no loss as a result.

12. In *Catharine Syme*, [1983] OLRB Rep. May 775, the Board said:

20. Section 68 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes this to be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual

case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

Nothing in the evidence before me suggests that YUSA acted in an arbitrary, discriminatory or bad faith manner in its representation of the complainant prior to June 6, 1985. Nothing in that evidence suggests that either the union's appraisal of the potential risks and benefits of arbitrating her grievance or its conclusion that York's last offer was an appropriate settlement of that grievance was unreasonable. Although it did seem curious that the trade union's executive voted on what it would do in the face of a reasonable offer before they received one, their expectation that one would be forthcoming was borne out and, having heard Ms. Liebman testify, I can understand the union's concern that she might reject an objectively reasonable offer if she thought she could still have her day in court.

13. YUSA's decision to withdraw the complainant's grievance from arbitration would not have violated section 68 if she had told it that she rejected York's offer. That, however, is not what occurred. YUSA did not withdraw the grievance because of something she or her solicitor told it, in a call for which it was waiting that morning and for which Liebman and her solicitor were entitled to expect it would wait. It was not an express or implied condition of the offer that Ms. Liebman have no communication with anyone at York before accepting or rejecting it, yet YUSA withdrew the grievance from arbitration because it had learned from York that she had tried to make an appointment to see York's President. On the basis of that fact it assumed, incorrectly, that Liebman had decided to reject the offer. It acted on that assumption without first speaking to Liebman or Campbell, as it could easily have done within the time constraints it faced.

14. As the Board noted in the above-quoted passage from *Catherine Syme, supra*, when dealing with a decision whether to take a grievance to arbitration, "[t]he trade union must give [the] grievance its honest consideration..." It is essential to the honest consideration of a grievance that the union ascertain from the grievor, or afford her an opportunity to discuss with it, her version or explanation of the relevant events and circumstances, particularly those which it may weigh against her in deciding whether to pursue that grievance. As the Board observed in *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, at paragraph 48:

The union cannot be said to have directed its mind to the merits of a grievance or potential grievance if it has not ascertained the grievor's version of the situation.

The same applies to those events or circumstances from which a trade union may be disposed to conclude that a grievor no longer wishes his grievance pursued to arbitration: *Consumers Glass Company Limited*, [1979] OLRB Rep. Sept. 861. As a general proposition, it can be said that a trade union will breach section 68 if it fails to take reasonable steps to ascertain from its grievor, or to afford her an opportunity to discuss with it, her version or explanation of events and circumstances which, if not contradicted or satisfactorily explained, would lead the trade union to act against that grievor's interest with respect to her grievance. Like any other general statement of principle, this one will be found to have its limits and exceptions. The facts of this case, however, fall squarely within the ambit of this important principle, whatever form of words might be chosen to state and delimit it. Having defined as critical the question whether or not its grievor would decide one way or the other with respect to a settlement offer, the union acted arbitrarily and breached section 68 by making an assumption on the point without asking the grievor, either directly or through counsel, what decision she had made.

15. The object in fashioning a remedy under subsection 89(4) of the Act is to put the complainant in the same position, so far as possible, as if the Act had not been violated. Counsel for

the respondent union argues that Liebman's position was unaffected by the withdrawal of her grievance from arbitration, having regard to evidence that the university was still willing to offer her two comparable positions. Counsel for the complainant takes the same position her solicitor took at the time - that the withdrawal of the grievance must inevitably have had an effect on Liebman's bargaining position thereafter, as appears from the fact that York had withdrawn other elements of its June 5th offer. On the evidence before me it seems more likely than not that the withdrawal did have some effect which could best be remedied by reinstating the arbitration of the grievance. In the event the grievance is not settled before hearing and results in an arbitration award, liability for any monetary compensation awarded to Ms. Liebman with respect to the period between June 6, 1985, and the date of this decision shall be borne by the union. Because of this aspect of the remedy, the arbitration should be performed by a sole arbitrator and not a tripartite board of arbitration. The intervener will be required not to raise either the earlier withdrawal or the consequent delay as a bar or defence in arbitration of the grievance.

16. In addition to reinstatement of the arbitration, the complainant asks for an order entitling her to representation by counsel of her choice at arbitration and that the union pay her costs of this complaint. I am not aware of any decision of this Board in which either order has been made part of a remedy for a breach of section 68. This case presents no feature which would warrant reconsidering or departing from the approach to claims for costs taken by the Board in such cases as *Repac Construction & Materials Ltd.*, [1976] OLRB Rep. Oct. 610, *Radio Shack*, [1979] OLRB Rep. Dec. 1220, *Grey Owen Sound Health Unit*, [1980] OLRB Rep. Feb. 223, *Comstock Funeral Home Ltd.*, [1981] OLRB Rep. Dec. 1755, *Silkknit Ltd.*, [1983] OLRB Rep. Nov. 1913, *Daynes Health Care Ltd.*, [1984] OLRB Rep. Feb. 224, *Luciano D'Alessandro*, [1984] OLRB Rep. Aug. 1088 and *John Glykis*, [1985] OLRB Rep. Mar. 420. For reasons set out in those cases, the complainant will not be awarded costs. As for representation at arbitration, the Board does not always make an order giving the successful section 68 complainant a say in who will present her grievance at arbitration: *Phillip Wayne Bradley*, [1983] OLRB Rep. June 865 and *John Glykis*, *supra*. When such an order is made, the union's continuing interest in the matter is taken into account by requiring that it retain counsel jointly selected by it and the complainant: *Leonard Murphy*, [1977] OLRB Rep. Mar. 146, [1977] 1 Can. LRBR 422, *Bedard Girard Ontario Ltd.*, [1981] OLRB Rep. Oct. 1338, and *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215 and [1984] OLRB Rep. Oct. 1383. It is appropriate in this case to make an order in that form.

17. While this decision requires that the arbitration of Ms. Liebman's grievance be reinstated and rescheduled for hearing before a sole arbitrator, it does not require that the arbitration hearing inevitably take place. It need not, if the grievance can be settled in the meantime. The union has the right to settle grievances without the consent of grievors, subject only to the requirements of section 68. The remedy in this case will not include a direction that the grievance not be settled without the complainant's consent, but only that the union not agree to a settlement without first advising the complainant of the proposed terms and affording her or her representative an opportunity to discuss them with those who will make the union's decision whether to agree to the settlement. It is important for Ms. Liebman to understand that if the union can obtain a settlement of her grievance which gives her as good a remedy as an arbitrator might reasonably be expected to award with respect to the alleged improper job transfer, she will not then be in a position to insist that the grievance proceed to a hearing.

18. In summary, the Board finds and declares that the respondent trade union acted arbitrarily in deciding to withdraw the complainant's transfer grievance on June 6, 1985, contrary to section 68 of the *Labour Relations Act*, and orders and directs that:

- (a) the respondent and intervener shall reinstate the arbitration of the com-

plainant's transfer grievance and reschedule it for hearing by a sole arbitrator agreed upon by the respondent, complainant and intervener. If those parties are unable to agree on a sole arbitrator, the respondent and intervener shall jointly request of the Minister of Labour that he appoint one.

- (b) The intervener shall not raise either the earlier withdrawal of the grievance or the consequent delay as a bar or defence in the arbitration of the grievance. If any monetary compensation is awarded to the complainant with respect to the period between June 6, 1985, and the date of this decision, it shall be paid by the respondent union rather than the intervener employer.
- (c) The respondent union shall retain counsel jointly selected by it and the complainant to act in its name at and in connection with the arbitration of the grievance.
- (d) The respondent union shall not agree with the intervener employer to a settlement of the complainant's grievance without first advising the complainant of the proposed terms of settlement and affording her or her representative an opportunity to discuss them with those who will make the union's decision whether to agree to the proposed settlement.

The Board remains seized of this matter to resolve any dispute arising over the interpretation or implementation of these directions and orders.

1607-84-U Donald McConvey, Complainant, v. United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 46, Respondent

Duty of Fair Referral - Unfair Labour Practice - Union adopting policy of refusing name-hires following pre-job conference - Depriving complainant of job opportunities - Whether union action arbitrary, discriminatory or in bad faith

BEFORE: *Owen V. Gray*, Vice-Chairman.

APPEARANCES: *C. J. Abbass* and *Don McConvey* for the complainant; *L. C. Arnold* and *S. O'Ryan* for the respondent.

DECISION OF THE BOARD; June 19, 1986

1. The nature of this complaint was described in an interim decision dated September 10, 1985, now reported at [1985] OLRB Rep. Sept. 1386 at paragraphs 2 and 3. I quote those paragraphs here as a convenient starting point for this decision:

2. The complainant is a member of the respondent trade union. When work is available, he works as a pipefitter for pipeline contractors who are party to collective agreements with the respondent's parent International Union and those of its Locals, including the respondent local, to

which it has assigned pipeline jurisdiction. The provisions of those collective agreements which control the hiring of journeymen pipefitters and welders for pipeline construction projects give the employer the right to fill a certain percentage of the available jobs with trade union members it requests by name with the trade union selecting and referring the remainder of the required employees. Because pipeline contractors have the right to "name hire" a percentage of their crew, experienced pipeline workers solicit work by approaching contractors directly and asking that they be "name hired".

3. The complainant says the respondent trade union violated section 69 of the *Labour Relations Act* by refusing to honour contractors' requests to "name hire" him and by interpreting and administering the applicable collective agreements in such a way as to restrict the opportunity for "name hires" and, therefore, the opportunities for direct solicitation of work.

2. Section 69 of the *Labour Relations Act* provides:

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

In this case, the relevant collective agreement is the Mainline Pipeline Agreement between the Pipeline Contractors Association of Canada on behalf of its members and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the United Association") and those of its local unions, including the respondent ("Local 46"), to which it has assigned jurisdiction in Canada, covering the period from May 1, 1983 to April 30, 1985. Article V of that agreement provides, in part, as follows:

ARTICLE V

HIRING PROCEDURE

A. Upon receipt of the Job Notification from the Employer the Local Union(s), shall, prior to the pre-job conference provide the Employer with a list of available qualified Journeymen.

B. The Employer shall select fifty percent (50%) of the required Journeymen from the list of qualified members supplied by the Local Union(s). The Employer shall have the right to select twenty-five percent (25%) of the required employees from any source provided such employees are members of the Union. The remainder of the required employees shall be supplied by the Local Union(s) provided that qualified members are available.

C. The ratio of employees selected from and supplied by the Local Union(s) shall be maintained throughout the project.

The pre-job conference referred to in paragraph A of Article V is dealt with in Article IV, paragraph B as follows:

ARTICLE IV

JOB NOTIFICATION AND ENFORCEMENT

...

B. The Employer and the Union shall hold a pre-job conference before the start of the job and the Union Representatives of the Local Unions in whose jurisdictional areas the work is being performed shall be authorized by the Union to represent the Union at the pre-job conference and establish those job arrangements stipulated in this Agreement for the duration and for the entire area covered by the job. The purpose of the pre-job conference shall be to define those matters outlined in the Pre-job Conference Report which is attached to this Agreement as an Addendum, but not including the changing of any of the conditions of this Agreement nor any

interpretation of any of its clauses. Any interpretation of this Agreement shall be made between the prime parties hereto so that proper application thereof may be made on the job.

The Pre-Job Conference Report form referred to in this paragraph appears as Addendum B to the agreement. Matters outlined in that form include the hiring procedure and particulars of the numbers and classifications of workers required in the crew which will do the work described in the report.

3. The Mainline Pipeline Agreement is not the only collective agreement pursuant to which the respondent trade union is "engaged in the selection, referral, assignment, designation or scheduling of persons to employment". By far the greatest volume of the work its members perform is not in the pipeline field but in various sectors of the building construction and industrial maintenance industries. When and to the extent that this union has the opportunity to select persons for assignment to job opportunities in those fields, it uses an "out-of-work list" system which was described in detail in the Board's decision in *Thomas Beck*, [1985] OLRB Rep. Jan. 14. That system involves the use of an out-of-work list to which a member can add his (or her) name when his employment is terminated. Subject to certain refinements described in the *Beck* decision, a member's ranking on the out-of-work list depends on the date he registered as out of work, and referrals are made from the list on a "first-in, first-out" basis. The list used for referral to building construction and maintenance work, however, was not used in making referrals under the collective agreement under consideration here.

4. The daily affairs and business operations of Local 46, including the referral to work of members and the operation generally of its hiring hall, are under the control and supervision of its business manager by virtue of section 104 of the Constitution of the United Association. Sean O'Ryan succeeded Bill Howard as the respondent's business manager in 1983. According to O'Ryan and Bill Weatherup, the respondent's pipeline business agent, there was no clearly defined, consistent method of selecting members for referral to work on pipeline projects during the tenure of Mr. Howard and his predecessor. To be fair, the need for formality and structure was less pressing in those years when, as the evidence discloses, the number of pipefitters and welders with the necessary experience in the pipeline field was small and none of those persons was ever without work for long. Substantial increases in available pipeline work during the early 1980's provided pipeline opportunities for more members of Local 46, leaving a greater number of experienced workers seeking a diminished number of pipeline jobs when those big projects came to an end.

5. During a period in which the number and financial attractiveness of pipeline work opportunities was increasing, Mr. Weatherup proposed, and in May 1982 the union's membership passed, the following resolution:

WHEREAS, there is an ever increasing job opportunity in the energy field.

WHEREAS, it is part of our trade and the opportunity to work in that field and the opportunity to work in that field should be available to all members of Local 46 if they so desire to put the effort in to obtain the basic required knowledge.

WHEREAS, posting of a visible list is consistent with our general policy relating to the out of work book.

THEREFORE be it resolved. A separate list be posted on the out of work board pertaining to three categories

Welder Pipeline

Fitter Pipeline

Helper Pipeline

1. Helpers having qualifications of fitter or plumber shall have opportunity to progress to the bottom of pipeline fitter list after completion of 16 weeks as pipeline helper that including a minimum of six weeks work on front end.
2. The pre-job hiring procedure by pipeline agreement. This is to ensure at least 25% of the members request come off the out of work list.
3. All request for additional help after pre-job by contractor come off the respective posted lists.

The precise mechanics of constructing and maintaining the separate out-of-work lists called for by this resolution were the subject of considerable discussion between O’Ryan and Weatherup after O’Ryan took over as business manager in 1983. Having regard to the evidence before me, I find that the approach they adopted and the steps taken to implement it were as they have been described in an earlier decision of the Board (differently constituted) in *Raphael A. Julien*, [1985] OLRB Rep. Apr. 537, particularly at paragraphs 16 and 17. I will not repeat what was said there. It is enough to observe that a member’s placement on these pipeline lists was made a function of both the period of time since the member’s last pipeline work and the period of time since the member last registered as out of work for the purpose of the building trades list. That formula is not under attack in these proceedings nor, having regard to his periods of employment with McWaters Plumbing, is McConvey complaining that he ought to have received a referral as a result of the operation of these lists.

6. In his dealings as business manager with pipeline contractors at pre-job conferences, O’Ryan seeks to persuade the contractor not to exercise, fully or at all, its right to select twenty-five percent of its work force from the membership of other locals of the United Association. In that respect, his approach was the same as that of his predecessor, Bill Howard. What O’Ryan seeks, instead, is an agreement that the contractor would name-hire from among Local 46 members up to fifty percent of the required crew and Local 46 would select and dispatch the balance of the required tradesmen. In this respect, O’Ryan’s approach did differ from that of his predecessor, who had often agreed that a contractor could name-hire all of his crew, provided they were all members of Local 46. O’Ryan also asks that the contractor specify at the pre-job conference not only the numbers of journeymen, welders and helpers it requires for its crew but also the names of all of its name-hire selections as well as alternates in case those first choices prove to be unavailable. The names of persons selected by the employer as its name-hires and alternates are ordinarily set out in the pre-job conference report signed by both parties, a copy of which is posted in the union dispatch office following the pre-job conference. Having had an employer identify all those who could be the object of the employer’s right under Article V to select a portion of his crew, O’Ryan takes the position that there can be no name-hires after the pre-job conference with respect to work covered by the pre-job report. That appears to be, or result in, another change in practice, since name-hiring of persons not requested at a pre-job conference did occur on pipeline projects before O’Ryan became business manager.

7. It is against that background that McConvey made this complaint. McConvey was one of the first members of Local 46 to “break out” into pipeline work, at which he is universally regarded as highly skilled. It would appear that until 1984, at least, when pipeline work was available, he was generally able to solicit his own job, and did not rely on the respondent trade union to find him work. More than once in the spring and summer of 1984, however, McConvey had the disheartening experience of soliciting work from a pipeline contractor who would assure him he would be name-hired, only to be told by the union that he could not have a referral slip because, it

said, he had not been requested by the employer. As originally framed, this complaint alleged that in three such situations the pipeline contractor had actually requested him by name but the union had denied him a referral slip because, McConvey alleged, the union's officials bore ill-will toward him. McConvey's complaint connects these refusals with events a year earlier, in which he became the subject of discipline by a union trial board as a result of drunk and disorderly behaviour at a union meeting.

8. The hearing of this complaint occupied several hearing days spread out over the course of a year. During McConvey's wide ranging case in chief and the union's exhaustive response, the Board was presented with detailed evidence of Mr. McConvey's employment history and that of others whose names emerged in evidence, a detailed examination of what took place at the pre-job conference for each of the jobs on which McConvey's complaint initially focused, a blow-by-blow examination of the incident which gave rise to the union's discipline proceedings against McConvey, a review of the discipline proceedings themselves and of several instances in which other union members had disrupted meetings and been disciplined as a result, a close examination of the meaning of the words "solicited" and "dispatched" when used in documents posted in the hiring hall to show what job referrals had been made, and a thorough investigation of the circumstances in which, through an erroneous assumption on the part of a dispatcher, another member got a referral slip without being dispatched from the list or name-hired by the employer. While no demonstrably irrelevant evidence was entertained when it was objected to, much of what was led can best be described as marginally relevant to the central issues and insignificant in the result. I do not propose to review such evidence here.

9. McConvey did not call any witness with firsthand knowledge of any contractor's having unsuccessfully sought to name-hire him in the exercise of its rights under Article V of the collective agreement. As evidence of the one such allegation which he continued to press to the conclusion of the hearing, counsel for McConvey sought to tender the following letter written to McConvey by Jerry Lozynsky, an employee of Marine Pipeline of Canada Limited ("Marine"):

This letter will confirm our endeavours to name request you for employment on our pipeline project for I.P.L. in Clarkson, Ontario. The following is a brief summary of the events:

1. On July 5, 1984, we called the Local 46 dispatch office and name requested you as a journeyman for our pipeline project. We were advised at that time by the pipeline business agent that you were too far down the list and therefore you were unable to be dispatched to the project.

2. On July 6, 1984, we again called the Local 46 dispatch office and requested you as a Straw Boss. We were advised that this could be facilitated, but you were not able to perform any journeyman work.

We found this situation impractical and inefficient for our project, and therefore we ceased our endeavours to obtain your services on our project.

Should you require additional information, please contact us at 403-274-3433 in Calgary.

I ruled that I would not accept the letter as evidence of the truth of its contents, for reasons which are set out in my decision of September 10, 1985. Rather than seek a dismissal of this aspect of McConvey's complaint for want of evidence, the respondent trade union dealt with the allegations in this letter during the testimony of its business manager, its pipeline business agent and its two dispatchers, thus examining and making available for cross-examination every official or employee of the respondent who could have been a participant in conversations of the sort referred to in this letter. Their evidence was that McConvey was not name-hired at the pre-job conference, nor was he requested "as a journeyman" at any time thereafter. Marine officials did have a discussion with

Bill Weatherup about whether McConvey could be referred as a “utility fitter”, a term not used in the collective agreement nor recognized by Bill Weatherup despite his experience in the pipeline field. When Weatherup asked the Marine officials what they meant by this term, their explanation led him to believe, and to say to them, that they were describing the position of “straw boss”. “Straw boss” is a first-line supervisory position outside the bargaining unit (and, thus, beyond the ambit of Article V of the collective agreement), and one to which Local 46 was more than happy to refer McConvey. McConvey told O’Ryan in early July that he expected to be sought by Marine as straw boss shortly before Weatherup reported to O’Ryan his conversation with Marine officials on this subject. O’Ryan asked one of the dispatchers to call Marine and ask when they wanted McConvey as straw boss. The dispatcher did so. The person he spoke to, whom he believes was Jerry Lozynsky, said that Marine did not want McConvey as straw boss at that time. None of the four union witnesses ever received a request from Marine that McConvey be referred as a straw boss on the project in question.

10. Counsel for McConvey did not call Lozynsky as a witness during his case in chief. He did not attempt to call him in reply. In argument, he submitted that the Board should draw an adverse inference from the fact that *the union* did not call Lozynsky as a witness with respect to the alleged refusal to honour his name-hire request. Despite that and other equally imaginative arguments offered by counsel for McConvey, I am left with no affirmative evidence whatsoever of a refusal by the union to honour any contractor’s request that McConvey be referred to work, either pursuant to the subject collective agreement or otherwise. I would have no such affirmative evidence even if I disbelieved, as counsel for McConvey submitted I should, all of the evidence offered by the union’s witnesses apart from Weatherup’s evidence about his conversation with Marine officials about the possibility of referring McConvey as a “utility fitter”. I should say that I do not disbelieve those witnesses, nor do I accept the submission that their explanations of hiring and pre-job conference procedures represent an elaborate fabrication designed to camouflage single-minded determination by union officials to so arrange its dealings with employers as to preclude McConvey from obtaining work. On the contrary, I accept as honest and credible the evidence of all of the union’s witnesses. With respect to the discipline imposed on McConvey in 1983, in my view, neither the conduct nor the result of those proceedings warrants any inference that the union generally, or O’Ryan specifically, then or thereafter was influenced by ill-will toward McConvey or predisposed to act in bad faith in any matter which could fall within the ambit of section 69.

11. With respect to McConvey’s alternate claim that the union breached section 69 by administering the collective agreement in such a way as to restrict the opportunities for direct solicitation of work, counsel for the union correctly observed that there is no evidence to show McConvey suffered any loss attributable to any difference between the way O’Ryan administered or interpreted the collective agreement and the way in which O’Ryan’s predecessor administered and interpreted predecessor collective agreements. Nevertheless, counsel for the union urged the Board to deal with McConvey’s argument on its (disputed) merits. I am satisfied that it would be appropriate to do so and will, for that purpose, assume that the differences between the way O’Ryan deals with hiring under the mainline pipeline agreement and the way with which hiring was dealt by O’Ryan’s predecessor are likely to reduce the number of work opportunities McConvey can secure in the pipeline field.

12. Analysis of McConvey’s argument must begin with some general observations about the nature of a hiring hall, and in that regard I adopt the following observations of the Board (differently constituted) in *Joe Portiss*, [1983] OLRB Rep. July 1160.

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was

not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls in The Maritime Industry. Sub-Committee On Labour Management Relations of Senate Committee On Labour And Public Welfare*, 81st Cong. (2d) ses. 100-01 (1950) and Bastress, "Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls [1982] West Virginia Law Review 31). If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvas numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.

8. To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system effectively vests in those union officers' powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

The factual premise of McConvey's argument is that he is more likely to get work in the pipeline field when pipeline employers are permitted to choose their employees than he is if the union is entitled to distribute the available work among all adequately qualified members. In that respect, McConvey would fall within the "privileged few" category referred to in paragraph 7 of this extract from *Portiss*.

13. His counsel argued that McConvey's "right" to solicit his own work is analogous to seniority rights about which the Board has special concerns in matters arising under section 68 of the Act. He argues that an impairment of that right constitutes a violation of section 69. He also argues that the trade union's policy of allowing no name-hires after the pre-job conference and its policy of seeking employer agreement to increase the relative percentage of the jobs filled by dispatch from the out-of-work list both violate or are inconsistent with Article V of the collective agreement and therefore violate section 69.

14. Having regard to the substantial differences between construction industry employment relationships and those employment relationships in which long employment with a single employer is expected and comes to be reflected in seniority rights, it is difficult to establish any close analogy between seniority rights of that sort and the rights or expectations of construction workers whose employment opportunities are affected by the operation of a hiring hall. To the extent such analogies can be drawn, however, the particular analogy are proposed by counsel for

McConvey is quite inapt. In the context in which seniority rights have their ordinary meaning, the potential contest for work opportunities is between the employee whose turn to be considered has arrived because of the effluxion of time in employment, on the one hand, and the employee whom the employer would have selected for the job opportunity but for the seniority rights, on the other. From the perspective of the latter employee, the availability to him of job opportunities is restricted by any requirement that seniority be recognized. It could be said of that employee that his “right” to solicit such job opportunities is interfered with by the seniority provision won by the union in negotiations. The use of the word “right” in this regard is inappropriate, of course, both in his case and in McConvey’s. The name-hire provisions of the collective agreement do not provide McConvey with solicitation rights - the only relevant rights are the name-hire rights of the employer parties to that collective agreement. If there can be any analogy between seniority rights and the operation of hiring halls, it is the one which was offered by the complainants in *Maurice Berlinguette*, [1986] OLRB Rep. Feb. 194, where the issue was whether the referral to work without regard to their place on the out-of-work list of members the union desired to act as job stewards was a violation of section 69:

20. The complainants’ representative argued, as he had with witnesses during his examination of them, that the purpose of the out-of-work list was to make a fair distribution of work opportunities on the basis of “seniority on the out-of-work list” and appropriate qualifications to perform the work required by the employer. He argued that a steward ought to be selected from those otherwise entitled to a referral to the job, and that the union ought to have a training program for stewards.

21. These arguments highlight the interests which must be balanced by a union which operates a hiring hall in determining the basis on which referral decisions will be made and the factors to be taken into account in making them. The trade union has a legitimate interest in maximizing the quantity and quality of its future work opportunities. From that perspective alone, it makes sense to send out only “the best”: not only the best stewards, but also the best workers. The trade union also has a legitimate interest in ensuring that there is an equitable distribution of work opportunities among all those with the minimum qualifications for those opportunities. That perspective favours a rigid “first in, first out” system. Obviously, these interests conflict. Any set of hiring hall rules, procedures or guidelines will necessarily reflect a compromise which results from a balancing of those and other conflicting individual and group interests. From the perspective of the *Labour Relations Act*, the trade union is free to strike that balance as it sees fit, so long as it does not act in a manner which is arbitrary, discriminatory or in bad faith.

15. Both at the bargaining table and during the term of any collective agreement which results from bargaining, a trade union is entitled to seek from the employer those accommodations and changes which it feels best advance the collective interests of the employees it represents. Changes in hiring procedures and job rights will almost inevitably have a differential impact on those who are or may become employees governed by the collective agreement. When a trade union wins recognition of seniority rights as a means of minimizing possible employer favouritism in the assignment of work opportunities, that will have a negative impact on those employees who might otherwise have been the beneficiaries of such favouritism. Similarly, changes in the scope, effect or relative weight given to seniority will almost inevitably benefit some workers more than others. As the Board observed in *Dufferin Aggregate*, [1982] OLRB Rep. Jan. 35:

17. Allocating work and wages, whether in scarcity or in plenty, is the central fact in any scheme of collective bargaining. The struggle between union and management over the division of profits in the form of wage and benefits settlements usually gets the bulk of public attention. The less visible question, however, of which employees will work and how much they will get is often no less important. It may generate as much heat inside the union hall as does the confrontation with the employer outside. That kind of internal union tension stands in high relief in the facts of this case.

18. There are those who maintain that it is inconsistent with the duty of a trade union to fairly

represent individual employees for the union to take steps that will prejudice employees' vital job interests, including their job security. That view has generally been associated with the argument for an absolute right of individuals to have access to arbitration for such serious consequences as the loss of their employment. (See, e.g. Blumrosen, *Legal Protection for Critical Job Interest: Union Management Authority Versus Employee Autonomy* (1959), 13 Rutgers L.Rev. 631.)

19. The fact, however, that a union may be required in bargaining to make a hard decision that has a serious economic impact on individuals, up to and including the loss of their jobs, cannot of itself make that decision unlawful. That kind of decision is, moreover, not unusual. In making collective agreements it is practically impossible for unions to avoid making decisions that benefit one class of employees at the expense of another. For example when a union opts for more wages rather than better pension provisions it benefits its younger members rather than the older ones. Trade-offs of that kind are the everyday stuff of collective bargaining.

20. Under the *Labour Relations Act* such decisions are lawful so long as they are not arbitrary, discriminatory or in bad faith within the meaning of section 68 of the Act. In the knowledge that unions are commonly required to make hard decisions affecting their members, those words have been deliberately chosen by the Legislature to avoid undue interference in the internal affairs of trade unions. The Board's powers of review over union actions under the section go only to matters of representation, when the quality of representation falls below the limited threefold standard set out in section 68....

In *Dufferin Aggregates*, the trade union had sought and obtained a mid-term amendment of collective agreement provisions which required (before amendment) that haulage work be distributed among a number of dependent contractor truck drivers on a work-sharing basis. The work available had fallen to a level which represented economic starvation for all or nearly all of those who were entitled to share in it. The change sought and obtained permitted the employer to lay off more junior dependent contractors, with the result that the senior ones would receive a greater allocation of work. The Board observed:

22. In this case the complainants ask the Board to conclude that the decision to effectively eliminate the jobs of a minority is in itself a violation of the duty to fairly represent the members of the minority. Counsel for the complainants argues that the grievors had a contractual right and expectation to work out of the quarry over the life of the collective agreement, and that to re-open the contract to undo that right is a violation of their vested rights inconsistent with the duty of fair representation.

23. As compelling as that argument may seem, in my view it does not assist the understanding of the issue to simply assert that the members of a minority have an absolute right to be protected against negative consequences to their job security. The collective agreement is a contract made between the employer and the union. They are the parties to it, and any benefits which it confers on individual employees are necessarily subject to the possibility of amendment between the parties. In this regard it should be recalled that a collective agreement is not "a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees". (*Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee*, [1959] S.C.R. 205; (1959); 18 D.L.R. (2d) 346; *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 (S.C.C.))

24. That is not to say that a trade union can with impunity disregard the interests of the employees it represents or take either a hostile or an indifferent attitude where employees' critical interests are at stake. In discharging its duty to fairly represent all of the employees in a bargaining unit a union must address its mind to the circumstances of those who may be adversely affected by its decision. It has a duty to weigh the competing interests of the employees it represents and make a considered judgement the procedure and result of which must be neither arbitrary, discriminatory nor in bad faith.

The Board went on to observe that special considerations attached to any decision by a union that alters or abrogates the job security of employees, especially in relation to seniority rights. It

observed that the Board must be especially concerned where the job opportunities of a minority are transferred to a majority as a result of the majority's decision, and explained that some objective justification for so doing must be offered by the union beyond the mere fulfillment of the will of that majority. The test to be applied was elaborated in paragraph 37 of the Board's decision:

37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators; the Board should ask not whether the decision is right or wrong or whether it agrees with it - rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

16. It is unnecessary to determine whether, as the union asserts, its rule against name-hires following the pre-job conference arises by necessary implication from the language of the collective agreement. If it does not, the fact remains that the union has been able to extract this concession from employers. It has also been able to persuade employers not to fully exercise their right to name-hire, so that the union is left with an increased number of job opportunities which it may fill by dispatch from the out-of-work list. Neither approach is inconsistent with Article V of the collective agreement. The language of Article V does not *compel* the employer to name-hire a percentage of its crew, nor does it require the union to encourage name-hiring. Whether or not it compels an employer to commit itself at the pre-job conference to an exhaustive definition of the use it can make of its name-hire rights on that job, Article V prohibits neither the making nor the solicitation of such a commitment. Once such a commitment is made and the right to name-hire is (it may reasonably be argued) exhausted, it naturally follows that name-hiring of persons other than those stipulated at the pre-job conference cannot be made thereafter. In that regard, on the evidence before me, it is entirely possible, indeed probable, that the existence of past instances of name-hiring after the pre-job conference merely reflects the fact that O'Ryan's predecessors did not request such exhaustive name-hire commitments at the pre-job conferences for those projects.

17. Whether or not O'Ryan's initiatives were compelled or expressly authorized by the resolution passed by the union's membership in May of 1982, they represent initiatives which O'Ryan in good faith felt were consistent with that resolution and, in the exercise of his authority under the union's constitution, felt best advanced the collective interests of the union's members. The impact of these policies on McConvey and other members of the "privileged few" category of experienced pipeliners is not as clear or as stark as the impact on junior dependent contractors of the decision under review in *Dufferin Aggregates, supra*. Taking that into account, I am unable to describe the changes wrought by O'Ryan and his reasons for them as unreasonable. While they result, as virtually any change in hiring procedures will, in a differential impact on union members, I do not find them to be discriminatory in the sense in which that word is used in section 69 of the *Labour Relations Act*. As I have indicated earlier, I am satisfied that the union, and particularly O'Ryan, did not act in bad faith toward McConvey or similarly situated members in adopting and applying these policies.

18. In short, McConvey has not established that the respondent acted in a manner which was arbitrary, discriminatory or in bad faith. This complaint is, therefore, dismissed.

0259-85-M Mechanical Contractors Association of Ontario, Applicant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, Respondent

Construction Industry Grievance - Evidence - Practice and Procedure - Union resiling from practice of permitting name hires - Whether ambiguity or estoppel permitting employer to lead evidence as to practice - Whether agreement permitting name hire - Whether union estopped from resiling from longstanding acquiescence for name hire - Whether estoppel giving binding contractual effect to benefit not in collective agreement - Elements of estoppel not made out

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *I. M. Stamp* and *K. Rogers*.

APPEARANCES: *G. Grossman* and *R. Haller* for the applicant; *A. M. Minsky*, *Q.C.* and *J. Boyle* for the respondent.

DECISION OF THE BOARD; June 4, 1986

I

1. This is an application under section 124 of the *Labour Relations Act*.

2. Having regard to the representations of the parties, the style of cause in this matter is hereby amended to delete the Mechanical Contractors Association Windsor ("MCAW") as the party-applicant, and substitute, in its place, the Mechanical Contractors Association of Ontario ("MCAO"). MCAO is the statutory collective bargaining agent for a number of Ontario contractors, including those unionized members of MCAW who initially launched this application. The respondent Local 552 is the Local of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("UA") with territorial jurisdiction in the Windsor area. Tradesmen who are members of Local 552 and work in the construction industry are ordinarily employed by members of MCAW. The "Pipe Trades Council", mentioned later in this decision, is the designated collective bargaining agent for all UA members working in the industrial, commercial and institutional (ICI) sector of the construction industry. Every two years MCAO and the Pipe Trades Council negotiate a provincial collective agreement in accordance with the province-wide collective bargaining scheme prescribed by statute. The portion of that provincial collective agreement directly relevant to this case is the Zone 4 (Windsor) Appendix, which reads as follows:

APPENDIX 4

ZONE 4 WINDSOR - LOCAL UNION 552

Article 101 HIRING

101.1 The Contractor agrees to give preference in employment to members of Local 552 and in recognition that *the Union is the sole agent for supplying employees* the employer shall oversee that no employee commences work in the jurisdiction of the Union unless such employee has a referral slip from the Union Office.

101.2 Windsor and Chatham shall be recognized as the base of operations and also as the *point of referral to the job site*. It is agreed that on work performed in Kent County, that Chatham based members of Local 552 shall be given preference in hiring. When Chatham based members are fully employed, preference for further employment shall be given to Windsor based members. The reverse shall apply for work in Essex County. REFER TO SCHEDULES "I" & "J" FOR TRAVEL AND/OR BOARD ALLOWANCE. *The Union recognizes the right of the*

Employer to select the foreman of his choice from the membership of Local 552. If all apprentices are employed in the Kent County Area, the Employer shall have the right to use an apprentice presently in his employ, for Essex County, providing the overall ratio of 5 to 1 is not exceeded in that Company.

101.3 It is also agreed that if the work involved requires the services of a tested, certified welder, for less than a full week's work, and there is no welder available from that area, that is currently holding a valid certificate for that Contractor, then that *Contractor shall have the right to use a welder currently in his employ* who holds such a certificate.

It is also agreed that *once a project is supplied with men*, that there shall be no "bumping" unless the work force has been withdrawn.

The reverse shall apply for work in Essex County.

101.4 It is agreed by the Contractor and the Union that only journeymen and apprentice members of the U.A. in good standing shall be employed on work under the jurisdiction of Local 552.

101.5 A contractor, who within three regular working days of a request to the Union, does not obtain the number of qualified members, he shall have the *privilege* of hiring other members of the U.A., providing they obtain work referral slips from the Union Office.

101.6 In instances when work of the Jurisdiction of Local 552 has been let to out of town contractors, such contractors must become a party to and comply with the provisions of this Agreement. The Contractor shall be allowed to send one U.A. Member for his respective trade as supervision, *any additional employees will be supplied from the Union Office.*

101.7 A member or members shall not be loaned or borrowed from one shop to another, and members shall not be exchanged between shops for any purpose.

101.8 A Contractor shall have the right to review the list of unemployed journeymen and apprentices at the time of hiring.

[emphasis added]

For the purposes of completeness it may be useful to reproduce the "management rights" clause found at Article 10 of the "master" portion of the agreement:

ARTICLE 10 - MANAGEMENT RIGHTS

10.1 The Council agrees that it is the exclusive right of each Contractor covered by this Agreement -

10.2 To manage its business in all respects in accordance with its commitments and responsibilities, including but not limited to the right to manage the jobs, locate, extend, curtail, or cease operations; to determine the number of men required, to determine the kinds of and locations of machines, tools, equipment and materials to be used and the schedules of production to be met, and to maintain order, discipline and efficiency.

10.3 To hire, discharge, promote, assign or reassign, demote, lay-off, or discipline employees for just cause.

10.4 To introduce new methods and facilities or to change existing methods and facilities.

10.5 It is agreed that all the above rights shall not be exercised in a manner inconsistent with express provisions of this Agreement, and shall be subject to the provisions of the Grievance

3. The instant case arises because in April 1985, Local 552 decided to unilaterally alter the hiring system then in existence in the Windsor area. The details of that system and the changes to it are set out more fully below. At this stage, it suffices to say that for many years the local contractors were permitted to select and employ ("name hire") without restriction, any available union member. By and large, the union did not interfere with this selection process, so long as the persons hired were union members in good standing. Referral slips were issued as a matter of routine. After April 1985, however, the union introduced a so-called "50/50 hiring system". Under this scheme, the employers' crews were to be composed, in equal proportion, of members name-hired by the employer, and employees selected by the union from its out-of-work list on the basis of the length of time those members had been unemployed. From the union's point of view, this results in a more equitable distribution of available work opportunities; but, of course, from the employers' perspective, there is now a significant restriction on their ability to hire whomever they want.

4. After the parties' opening statements, counsel for the applicant indicated that he intended to lead certain evidence of past practice and negotiating history which, it was said, would assist the Board in determining the intention of the parties when the language of the Zone 4 (Windsor) Appendix was chosen. He argued that the language of Article 1 of the Appendix is ambiguous, both on its face and in its application to the actions which the union has recently taken to alter the established hiring system. In his submission, there was, at the very least, a "latent ambiguity" which would become apparent when the Board considered the evidence as a whole. Finally, the applicant argued that Local 552 was *estopped* from unilaterally changing the hiring system which it had accepted and administered for years. The respondent resisted the introduction of any extrinsic evidence. The Board made the following oral ruling which is hereby reduced to writing and confirmed:

We have considered the submissions of the parties and certain of the authorities to which we were referred. We have also had the opportunity to consider the language of the collective agreement, and, in particular, Articles 101.1 and 101.8. There is language in the former clause which might arguably support the union's position that what is contemplated or permitted is what might be termed a "pure hiring hall list system" in which the union reserves the right to determine who will be dispatched on an employer's request - even though it is not disputed that for a number of years the practice of the parties has been the very antithesis of this kind of hiring hall system. On the other hand, the language of Article 101.8 does appear consistent with a practice of "name hire" which is the employer's proposed interpretation. We need not address these competing interpretations at this stage. It suffices to say that whether or not we would find that there is a *patent* ambiguity in the language of the agreement, the applicant seeks to introduce extrinsic evidence to establish that, at the very least, there is a *latent* ambiguity. In the alternative, the applicant seeks to establish that the trade union is estopped from resiling from the established and accepted procedure by which an employer fills his employee complement. In our view, the applicant is entitled to lead such evidence on either of these latter grounds. We will therefore receive the applicant's evidence, reserving as to the weight (if any) which should be assigned to it.

5. The parties' witnesses were testifying about events which dated back to the early 1970's, and not surprisingly, their recollections were sometimes imperfect, imprecise, or even contradicto-

ry. In assessing the witnesses' credibility and the weight to be accorded to their testimony, we have taken into account such factors as their demeanour, the clarity and consistency of their evidence when compared with that of others and such documentary evidence as may be available, their performance under cross-examination, and their apparent ability to resist the influence of self-interest or self-justification when answering difficult questions. It will be convenient to examine the "name-hire" practice in a little more detail, then sketch in the additional events in approximate chronological order.

III

6. As we have already noted, for most of the last 15 years, the employer-members of MCAW have had an entirely free hand to hire whomever they wanted so long as the prospective employee was a member in good standing of Local 552. Employers learned of prospective employees in a variety of ways. Sometimes unemployed members would solicit work directly, when they learned that a particular contractor was starting a new job. Sometimes existing employees told their friends of upcoming work opportunities. Sometimes the contractor made the initial contact, based upon information received from his existing employees. Sometimes the contractor would call the union hall to find out who was on the union's "out-of-work list", then call the members he knew and invite them to come to work for him. Sometimes the union would select and dispatch unemployed members - although this was relatively uncommon. Once a member was selected, he either obtained a referral slip from the hiring hall or the employer notified the hiring hall and the referral slip was sent by mail.

7. Since Local 552 has only 275-300 members who are active construction tradesmen, and a few major contractors dominate the local Windsor market, many of the local tradesmen and company officials knew one another because they had worked together before. This made it much easier for the companies to assemble their crews and helps explain why a pure "name-hire" system was both workable and desirable from the employers' point of view. The employers could minimize their risks and guarantee labour productivity by hiring only tradesmen with a proven record. However, under a pure name-hire system, newcomers, or persons perceived as a "problem" (rightly or wrongly) might not be hired at all - whatever their qualifications - and as long as the local market was sluggish, they could remain unemployed for extensive periods of time. In contrast, under the 50/50 system introduced by the union in 1985, these members would have a better chance of being hired and would be able to remain on the job so long as their work was satisfactory. To put the matter colloquially, the 50/50 system allows some of the lesser known or less desirable members to "get their foot in the door".

8. In the late 1960's, the local market was buoyant and Local 552 members had no difficulty finding work. There was full employment - even of those workers who would not be the major contractors' first choice. This favourable situation was reversed in the early 1970's when the Local began to face a serious unemployment problem. The majority of its members remained fully employed, but there was a significant minority who were finding very little work at all. To meet this problem, Local 552 decided to limit the employers' ability to "name-hire". The union introduced a new formula requiring the employers to take one or more individuals from the top of the out-of-work list for every person name-hired.

9. At this late date it is difficult to be certain about the mechanics of the new system or how long it remained in effect. The minutes of certain union meetings and the recollection of union witnesses suggest that it was endorsed by the union membership in the spring of 1972, and formally rescinded in the spring of 1974. However, there may not have been consistent application or compliance. Indeed, according to Don Bradey, who was president of Local 552 from 1972 to 1975, the new scheme was unpopular with both the contractors and the majority of members who had no dif-

difficulty finding steady employment. Bradey testified that the list system was eventually scrapped because it wasn't working, and by March 1974, was no longer necessary. Jean Paul Garant confirmed that the introduction of the list system was controversial and it was dropped in March 1974 because it was unpopular and was not being applied.

10. In 1972-73, Richard Haller, current president of MCAW, was an employee of a firm called Holleck-Volmer where he was responsible for hiring. Haller testified that he had heard complaints from other contractors about hiring restrictions and a "50/50" system but, at the time, his own company was phasing down, and he never encountered any difficulties. John Volmer testified that he too had heard complaints from other contractors, and conceded in cross-examination that the union was attempting to introduce a system which restricted the companies' right to hire whomever they wished. When a contractor called the union hall for a list of the unemployed members from which it used to be able to "pick and choose", the union would only supply a few names. As Volmer put it, "we were being frustrated...they were restricting our hiring practices". Whatever the longevity, coverage or effectiveness of the list system, it was obviously an irritant and a direct challenge to the employers' previously unfettered ability to hire the tradesmen of their choice. It was a problem which the members of MCAW decided to raise at the bargaining table.

11. In the bargaining for the 1975-77 collective agreement, MCAW proposed the following new clause:

A contractor shall have the right to review the list of unemployed journeymen and apprentices at the time of hiring. *The contractor shall have the right to choose the employee of his choice.*

[emphasis added]

As Mr. Haller explained: "The union was trying to restrict our hiring practices and we came up with a clause which would avoid it". But the proposal was *not acceptable* to the union. Local 552 was unwilling to concede or create a contractual right to name-hire. Jerry Boyle, who was at the bargaining table for the union, testified that the union negotiators had made it clear that they would not agree to an employer right to "name-hire" and they were reserving their right to reintroduce restrictions if they considered it necessary. Boyle was sure that "everyone understood that". But, ten years later, he could not recall any specific discussions. Neither could John Volmer. In any event, by that time the list system had been rescinded. MCAW decided not to press the issue. The parties agreed to the first line of the companies' proposed clause, which now appears as Article 101.8 in the Zone 4 Appendix. The second line, formalizing the right to "name hire", was dropped. After 1975, there were no more *local negotiations* dealing with *local* hiring practices, although hiring practices were occasionally the subject of bargaining at the *provincial* level.

12. In 1978, the Legislature fundamentally altered the structure of collective bargaining in the construction industry, by introducing a system of province-wide bargaining, by trade, through employer and employee bargaining agencies designated by the Minister of Labour. For practical purposes, the designated employee bargaining agency is a provincial council of local unions within a particular trade (electricians, carpenters, sheet metal workers, plumbers, etc.), and the designated employer bargaining agency is a provincial employer association representing employers which have bargaining relationships with those local unions. Under the new system, for the purposes of collective bargaining, the employers' rights are vested in the designated employer bargaining agency, and the rights of employees and local unions are likewise vested in the designated employee bargaining agency. Every two years the employee and employer bargaining agencies meet to conclude a new provincial agreement. The day-to-day relationships between the employer and his employees, the administration of the provincial collective agreement, and the application of that agreement to the circumstances of individual cases, are all left for resolution at the local lev-

el. But there can be no local bargaining, collective agreement or *other arrangement* affecting employees, other than the provincial agreement, and any such agreement or arrangement is null and void (see section 146 of the Act). After 1978, neither MCAW nor Local 552 had the independent right to bargain about or change the terms of the Windsor Appendix, including those governing local hiring practices. Collective bargaining was the exclusive prerogative of MCAO.

13. Since acquiring provincial bargaining responsibilities in 1978, MCAO has attempted to establish uniform contract language applicable to all employers and tradesmen in Ontario. Its objective is to gradually eliminate local anomalies, and, where possible, replace the local appendices with standard clauses in the "master" portion of the collective agreement. There have been frequent efforts to establish uniform hiring practices. In the first round of provincial bargaining in 1978, MCAO proposed a standard clause providing for "open hiring" - that is, total employer discretion as to which union member it would hire. This was what MCAW had tried to achieve. In 1982, MCAO proposed a "50/50" system as part of a total package to improve productivity. In 1984, the most recent round of bargaining, MCAO again proposed an "open hiring" system.

14. Had MCAO's 1982 proposal been incorporated in the collective agreement there would now be a clear contractual foundation for the system that Local 552 has brought into effect in Windsor. By the same token, if MCAO had been able to achieve its 1978 or 1984 bargaining objective, there would be a clear contractual foundation for the hiring practices of the Windsor contractors. But MCAO did not achieve its goal of a uniform provincial system of open hiring, so what remained in the agreement were the various local area appendices. Some of these have precise and express language dealing with name hiring. For example, Thunder Bay and London both have a scheme which approximates a "50/50" formula. Other local areas, including Windsor, do not have such specific contract language.

15. It is not disputed that from March of 1974 until at least the spring of 1983, the employer-members of MCAW were able to hire virtually any union member they wished, and the union would routinely issue a confirmatory referral slip. The union maintains that in February 1983, for a period of six to ten weeks, it once again introduced a "50/50" hiring restriction requiring the local contractors to select one individual from the top of the out-of-work list for every tradesmen name-hired. This restriction, it is said, was applied at the "Chrysler Project" which, at the time, was the biggest construction project in the area. However, the evidence of this alleged change of practice is far from satisfactory. We accept the evidence of Jerry Boyle, a union official, that Local 552 intended and attempted to impose some hiring restrictions on the Chrysler Project; but we also accept the evidence of the employer witnesses that the so-called change in practice was never applied to any of them - even on the Chrysler job. They continued to hire as before. Mr. Haller testified that in early 1983 he heard from other contractors about a "50/50" system, but it never affected him. In summary then, from about March 1974, until April 1985, the MCAW members were able to hire without restriction.

16. On or about April 29, 1985, members and officials of MCAW learned of the union's intention to introduce a new hiring system. Within a day or two they received a document describing that system:

PROPOSED HIRING SYSTEM

"50-50"

Employer has the right to name hire the first man. The second tradesman, regardless of the trade demand, will be hired according to his employment record over the past 12 months.

(This will be made on the basis of hours earned over the past year, as determined by benefit monies received on their behalf)

The employer must include in his name hiring, any foreman he desires to employ, and still maintain a 50-50 ratio.

A member is responsible to be licensed, and capable of performing his duties in a safe, productive manner. This does not mean that a welder must have a current ticket, but he must be capable of performing the procedures required.

A member is entitled to refuse one job in a calendar year without prejudicing his position on the list.

A contractor who terminates (fires) a member for just cause, will not be required to rehire that person for a six (6) month period.

There was no prior consultation. When MCAW asked Local 552 not to implement the new scheme until they could discuss the matter, Local 552 refused.

17. Mr. Boyle testified that the purpose of the change was to create work opportunities for members who were out of work. He testified that, in his opinion, the contractors were refusing to hire capable workers who were regarded as too old, or "trouble makers", or simply were not known to the prospective employers. In order to meet this problem, the union decided to supply employees and issue referral slips only in accordance with the scheme set out above.

IV

18. Leaving aside for the moment the particular terms of Article 101, it is worth noting that clauses of this nature (but in various forms) are fairly common in the construction industry because of the volatile employment environment and the special relationship between unions, employers and prospective employees. The union is not just the bargaining agent for those employees, but can often regulate access to employment itself. In *R M Hardy and Associates Limited and Teamsters, Local Union 213*, [1977] 2 Can.L.R.B.R. 357, Professor P.C. Weiler described these unique characteristics of the construction industry:

Most of the workmen in the construction industry are skilled tradesmen, usually having obtained tradesmen's qualification certificates after years of apprenticeship. Each of the distinctive trades has its own craft union, which may have a century-old tradition of representing its members in collective bargaining with the contractors who employ members of that trade. But most building trade unions have another role besides the customary representation of employees in collective bargaining: the hiring hall function. The reason is the highly cyclical nature of employment in the construction industry - stemming both from the rhythm of individual projects and the intermittent and erratic pattern in which major construction investments are brought on stream. In response to that pattern, contractors - whether general or specialty contractors - normally do not maintain a regular work force. They may retain a nucleus of key employees, but the bulk of their workmen are recruited as and when they are needed for a specific project for which the employer has obtained a contract. Where do they get these tradesmen? Through the union which represents that craft. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site. *In effect, the trade union performs the basic personnel function in the construction industry, by allocating jobs among the members of the work force.* Any one tradesman may be employed by a number of contractors in a number of areas in any one year. Besides paying the immediate take-home wages to the tradesmen on the job, the contractor also forwards directly to the union hourly contributions for health and welfare, vacation, and pension benefits, and these funds are administered by the union for its members. And the consequence is that the primary and enduring relationship in construction is between craft unions and tradesmen-members, not between employer and employee.

[emphasis added]

Union security arrangements and the “hiring hall” provide the same job security in the construction industry as seniority does in an industrial context, and to the extent that the union seeks to reserve work opportunities for its members and provide an equitable means of distributing available jobs, there will be an encroachment on an employer’s right to hire whomever he pleases. The degree of encroachment, of course, depends upon the particular terms of the collective agreement.

19. In the instant case, there are significant restrictions on the employers’ *initial selection* of those workers whom it wishes to hire. The Windsor Contractors can only employ members of the UA in good standing (Article 101.4), and must give preference in employment to members of Local 552. Moreover, under Article 1.01, the contractors recognize Local 552 as the “*sole agent for supplying employees*”, and they undertake that no employee will commence work in Local 552’s territorial jurisdiction unless such employee has first secured a referral slip from the union office. Whatever the practice may have been, it is difficult to reconcile this language with the assertion that employers can select whomever they wish, and the union must automatically issue the necessary referral slip validating their selection. If that were the case, it would only be necessary to require all prospective employees to be members of Local 552. There would be no need to constitute Local 552 as the *sole agent for supplying employees*, or to require a referral slip as a precondition for active employment. The words “sole agent” and “supply” signify a clear intention that the union is intended to be the exclusive source of prospective employees.

20. This impression is reinforced by the language of Article 101.5 which gives a contractor the “privilege” of hiring other UA members if within three working days of a request to the union (the sole agent for supplying employees) the contractor does not obtain the required number of qualified members; and such employees still require a referral slip from the Local 552 office. It is a “privilege” because it is a permitted exception to the general obligation, and is still subject to regulation by the Local. To prevent contractors or union members from avoiding the union office and the necessity of obtaining a referral slip for each work assignment, Article 101.7 provides that: “members shall not be loaned or borrowed from one shop to another, and members shall not be exchanged between shops for any purpose”. Out-of-town contractors must follow the same general regimen, except that they are allowed to send into the local area one UA member as supervision. Any additional employees must be supplied through the union office (Article 101.6).

21. Articles 101.2 and 101.3 deal with the geographic division of work within Local 552’s territorial jurisdiction and the permitted employer response where there are particular labour shortages. Those provisions are set out in paragraph 2 above and need not be repeated here. It suffices to say that some of the language used reinforces the impression that Local 552 is intended to be not just the *source* but also the *exclusive supplier* of workers in response to an employer’s request. The first sentence of Article 101.2 describes Windsor and Chatham as the “point of referral to the job site” and that phrase must be read in light of the fact that it is the union which does the “referring” and provides the necessary referral slip. Article 101.3 provides that once a project is “*supplied with men*” there shall be no “bumping” unless the work force has been withdrawn, and this phrase should usefully be read together with the words of Article 101.1 which make the union the “sole agent for supplying employees”. More significant - if only to underline the point - is the portion of Article 101.2 wherein “the Union recognizes the right of the Employer to select the foreman of his choice from the membership of Local 552”. The parties had no difficulty drafting language preserving an employer’s “freedom of choice” when that was their shared intent. There is no equivalent language governing the employment of ordinary tradesmen, and the language specifying the employer’s right to “name-hire” foremen would be unnecessary if he already had the right to “name-hire” everyone. Indeed, in the last round of unfettered local bargaining, the contractors’ efforts to insert such language into the agreement were quite specifically rejected by the union which was not prepared to agree to a proposed amendment to the Local agreement

which would entrench the right to “name hire”. The union was content that the employer could “select the foreman of his choice from the membership of Local 552”, but it was not prepared to agree that the contractor should “have the right to choose the employee of his choice from the list of unemployed members.” *Apart from questions of estoppel*, to which we shall return, we are inclined to accept the union’s position which, in our view, reflects the most reasonable interpretation of the language which the parties have used, and we are not disposed to “read in” a contractual term which was expressly proposed and quite clearly rejected.

22. The only portion of Article 101 which can clearly assist the contractors proposed interpretation is Article 101.8 which allows them to “review the list of unemployed journeymen and apprentices at the time of hiring”. However, this language does not obviously mandate a total system of “name hiring” - particularly since it was originally introduced in a form which would have mandated “name-hiring” and that portion of the proposal never gained acceptance by the union. The clause, as framed, is consistent with quite different purposes. It can accommodate the 50/50 system which the union has recently proposed. It can facilitate a perusal of the out-of-work list for the selection of foremen (as is the contractor’s right under Article 101.2). It permits the identification of qualified welders. It allows the contractor to identify the individuals who are likely to be referred to his job so that he can bring to the union’s attention any special needs or any particular objections to those individuals. Without, at this point, detailing what those objections might be, it is apparent that the union itself recognizes that the contractor need not accept persons who are unqualified and, for a period of six months (at least) need not rehire a tradesman who was previously discharged. In summary then, when one considers the origin and potential purposes of Article 101.8, we cannot conclude that it supports the Windsor contractors’ contention that they have an express or implied right to “name hire” their workers. To put the matter another way, we are not persuaded that the scope of legitimate internal union action to adopt “hiring hall rules” is circumscribed by the terms of the collective agreement.

V

23. The question remains whether the union is estopped from altering its internal rules respecting the referral of employees to work and whether the local contractors can insist upon the continuation of a “pure name hire” system even though such system is not provided for in the collective agreement and, some years ago, was specifically rejected.

24. The contractors’ position is that even if they have no contractual right to “name hire”, the union cannot resile from its longstanding acquiescence in that practice. It must continue to issue referral slips to whomever the contractors select. It cannot change that practice as it has recently done. Counsel points out that such change is not a neutral event from the Windsor contractors’ point of view, because it significantly affects the way in which they can assemble their crews with potential effects on employee productivity. In his submission, the purported change in the local hiring practices is tantamount to an amendment to the collective agreement which should properly be the subject of collective bargaining. Counsel further points out that the 50/50 hiring system which the union advocates already exists in other parts of Ontario but, in those locations, it was the subject of negotiation. The contractors argue that the union’s longstanding acquiescence in this practice amounts to a representation (upon which the contractors relied) that the practice would continue. Finally, the contractors contend that any alteration of the local hiring arrangement is contrary to section 146(2) of the Act. The contractors seek a direction requiring the union to return to the old method of doing things and urge the Board to remain seized in respect of any question of damages. (The contractors have been operating under the new system, under protest, since its inception.)

25. The union contends that the Board has no jurisdiction to elevate an unwritten practice

into an enforceable term of the collective agreement, nor can the employers found their claim on such practice. Here, there can be no violation of the collective agreement because the right which the employers assert has never been embodied in the collective agreement. When the Windsor employers attempted to do so, they were rebuffed - as was MCAO on two occasions when it sought to obtain for employers a contractual right to unlimited name-hire. That express repudiation of the employers' position negates any inference that the union would always acquiesce in and facilitate name-hiring regardless of the local unemployment situation or the problems of its unemployed members. In any event, the union has not acquiesced totally. For a period of two years in the 1970's, and for a shorter period more recently, the union did alter its procedure for referring workers to available jobs. Indeed, it was this change in the early 1970's which put the employers on notice that they could *not* count on continued union acquiescence in an open hiring system, and prompted them to seek a contractual foundation for that practice. The fact that the union may have permitted name-hire for considerable periods of time does not amount to an undertaking - let alone a legally enforceable one - that it would always continue to do so. Since there was no local bargaining and no local arrangement inconsistent with the terms of the collective agreement, there can be no breach of section 146(2) of the Act. In the union's submission, so long as there is no actual breach of the collective agreement, the union is entitled to alter its hiring hall rules from time to time to meet changing circumstances, just as the employer is entitled to change the way it runs its business - even though such changes may have an impact on the other party.

26. For the reasons we have already outlined, we do not think that the contract language supports the contractors' asserted right to pick and choose or "name-hire" the members of its work crews, nor is there any *express* right to require the union to issue referral slips to any persons whom the contractors select. If that right exists, it is not because of the contract language or the process of negotiation, since the employers' efforts to secure it through negotiation were rebuffed. It is based upon some "enforceable" notion that if the union has referred workers or issues referral slips in a particular way for a period of time, it may be legally required to continue to do so. Stripped of its legal labels, the contractors are asserting the acquisition of contractually enforceable rights by a process of accretion. The contractors must be permitted to "name-hire", not because the agreement gives them that right (although they tried unsuccessfully to get it into the collective agreement), but rather because the union has generally been prepared to permit them to do so. On this branch of the applicant's claim, it relies on the equitable principle of estoppel. It argues that there has been a representation by conduct (years of permitted name-hiring) that the union would not alter the way it refers workers even if it had a right to do so, and that the contractors have relied upon that representation to their detriment. The union argues that the requirements of estoppel have not been made out, and that the employers cannot use estoppel as a "sword" or the basis of a claim unsupported by express language in the agreement. Estoppel can only be used as a "shield" or a defence to a claim.

VI

27. We enter into any discussion of estoppel with some trepidation, for as Mr. Justice Reid observed in *Re Metropolitan Toronto Civic Employees' Union, Local 43, Canadian Union of Public Employees and Municipality of Metropolitan Toronto et al.*, (1985) 50 O.R. (2d) 18 at page 625:

Promissory estoppel has proven to be one of the more elusive and difficult recent creations of the common law, notwithstanding its repeated definition by the courts, principally by its modern proponent, Lord Denning. If bar and bench find it difficult to understand and apply, laymen who sit in arbitration proceedings of the type before us can hardly be expected to find it easy. My experience in the Divisional Court has revealed that difficulty is commonly experienced by arbitrators in wrestling with the true meaning of the doctrine and applying it.

Nevertheless, as that is the applicant's alternative submission, it is an issue that we must address.

28. The principle of estoppel, at least in its traditional form, is based upon the equitable notion that a person should not be allowed to insist upon his strict legal rights when he has so conducted himself that, having regard to all the circumstances, it would be unjust or unconscionable to allow him to do so. A classic statement of the principle can be found in *Combe v. Combe*, [1951] All E.R. 767 where Lord Denning observed:

...Where one party has, by his words or conduct, made to the other a *promise or assurance* which was intended to affect the legal relations between them and to be acted upon accordingly, then, once the other person has taken him at his word and acted upon it, the one who gave the promise or assurance cannot afterwards be allowed to revert the previous legal relations as if no promise or assurance had been made by him, but must accept their legal relations subject to the qualifications which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

[emphasis added]

This passage was cited with approval by the Supreme Court of Canada in *John Burrows v. Subsurface Surveys Ltd.*, (1968) DLR (2d) 354 (per Ritchie J.):

It seems clear to me that this type of equitable *defence* cannot be invoked unless there is some evidence that one of the parties entered into a *course of negotiation* which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that *there must be evidence from which it can be inferred that the first party intended the legal relations created by the contract would be altered* as a result of the negotiations.

[emphasis added]

Even more recently, the Supreme Court of Canada in *Town of Fort Frances v. Boise Cascade*, (1983) 143 D.L.R. (3d) 1983 had this to say:

The conditions in which the doctrine of promissory estoppel operates to prevent a party from insisting upon strict legal performance of a contract remain, in some respects, uncertain. It seems clear, however, that the principle which allows a party to raise a *promise or representation* that was made to him as a *defence*, is based upon the inequity of allowing the other party to renege from his statement where it has been relied upon to the detriment of the person to whom it was directed.

29. In these and other cases, the courts have required positive advertent conduct on the part of the party against whom the estoppel is raised. There must be a "promise", "assurance", "undertaking", "course of negotiation", or "statement" which was intended to affect the legal relations of the contracting parties. However, labour arbitrators have not been quite so rigid. A leading text on labour arbitration still enumerates the elements of estoppel as: "a representation by words or conduct, which may include silence, *intended to be relied on by the party to which it is directed*, some reliance in the form of some action or inaction, and detriment resulting therefrom" (Brown & Beatty, *Canadian Labour Arbitration* 2nd ed. (1984) at pp. 82-83); but, in practice, labour arbitrators have been more inclined than the courts to find an estoppel in order to preserve the existing pattern of the employer-employee relationship. In *Re City of Penticton and C.U.P.E., Local 808* (1978), 18 L.A.C. (2d) 307 (Weiler), the British Columbia Labour Relations Board explained:

That brings us to the problem of estoppel, another legal concept of the same genre. In its classic form, the application and the attractiveness of the notion of estoppel is quite easy to appreciate. One party enjoys a legal right under a contract. The party says that it is not going to enforce that right on a particular occasion. The other party relies on that representation and acts accordingly. Then the first party changes its mind and decides that it does want to enforce its strict legal rights; but only after its counterpart has irretrievably committed itself. The equitable doctrine of estoppel is designed to prevent such an unfair tactic. In the words of a noted Canadian arbitra-

tor, Dean Arthurs, "to use a common metaphor, you are not allowed to let someone go out on a limb so that you can saw him off": see *Re City of Toronto and Civic Employees Union, Local 43* (1967), 18 L.A.C. 273 at p. 280. Unquestionably, that policy is *a propos* in the administration of collective agreements. There has been some debate in the Courts about whether labour arbitrators could be trusted to use the remedy in order to relieve against the dictates of the collective agreement. (Cf. *Re Hospital Com'n, Sarnia General Hospital and London District Building Service Workers' Union Local 220, S.E.I.U.* (1972), 30 D.L.R. (3d) 660, [1973] 1 O.R. 240, 73 C.L.L.C. para. 14,157, p.21 (Ont. Div. Ct.); and *Ben Ginter, supra*. That issue is thoroughly canvassed by the arbitrator in *Re Edwards of Canada, Unit of General Signal of Canada Ltd. and U.S.W., Local 7466* (1974), 6 L.A.C. (2d) 137 (Adams).) Thus, at the outset, this Board wants to make it crystal clear that arbitrators in this Province definitely do have the remedial authority under the Labour Code to apply the equitable doctrine of estoppel in order to provide a final, binding, and sensible settlement of grievances under a collective agreement.

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[A] restricted view of the notion of estoppel is not consistent with the trend in the arbitration cases. By and large, Canadian arbitrators have assumed that the parties to a collective bargaining relationship have a broader obligation to each other; in effect, an affirmative duty to alert the other side that its practice under the collective agreement, its interpretation of particular contract provisions, is incorrect and unacceptable: see, for example, *Re Globelite Batteries Ltd. and U.E.W., Local 514* (1964), 15 L.A.C. 11 (Reville); *Re Jamaica Mfg. (Canada) Ltd. and Int'l Moulders Union* (1966), 18 L.A.C. 13 (Christie); *Re L.W. Mfg., Ltd. and Int'l Union, U.A.W.* (1967), 18 L.A.C. 294m (O'Shea), and *Re Globe & Mail and Toronto Newspaper Guild, Local 87* (1974), 6 L.A.C. (2d) 70 (Brown). The general arbitral position was put succinctly in the recent decision in *Re Ottawa-Cornwall Broadcasting Ltd. (CJOH-TV) and National Assoc. of Broadcast Employees & Technicians* (1977), 15 L.A.C. (2d) 64 (Fraser) at p.70:

Can estoppel arise from such inaction? The earliest helpful statement of the principle of estoppel is found in the judgment of Denning, L.J., in *Combe v. Combe*, [1951] 1 All E.R. 767...

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That statement clearly contemplates a positive act by way of words or conduct, coupled with an intent to affect legal relationships. However, the doctrine has been modified in its application to recent industrial relations situations, to allow its application where the union has in some way agreed to a practice resulting from an interpretation by the company which is at variance with the requirements of the collective agreement. An examination of the cases cited by Brown and Beatty in *Canadian Labour Arbitration*, at p.50, and referred to this board, indicates a number of occasions where arbitrators have accepted the application of the doctrine of estoppel under such circumstances, but there is a common thread running through those cases which is absent in the present case.

In each, there is an indication of some action taken, or right foregone, or verbal representation or agreement made by the union, which can be taken as evidence that it knows of the practice and is either not objecting to it, or has in fact agreed to it. In each, the union is at least knowingly, and in some cases, helpfully, allowing the company to crawl out on the Arthurian limb to retrieve the shield that blunts the saw.

30. In recognition of the unique characteristics of a continuing collective bargaining relationship, labour arbitrators have been inclined to take an expansive view of the doctrine of estoppel, and to accept a rather broad notion of estoppel by conduct. But until a decision by Professor D. M. Beatty, in 1981, they were not inclined to give binding contractual effect to benefits or advantages not provided for in the collective agreement. (See the analysis of the cases undertaken by Professor Schiff in *Re Monarch Fine Foods and Milk and Bread Drivers, Local 647* (1985), 18 L.A.C. (3d) 257.) The decision in *CN/CP* changed all that. (See: *Re CN/CP Telecommunications*

and *Canadian Telecommunications Union* (1981), 4 L.A.C. (3d) 205 (Beatty), and *Re CNR Co. et al. v. Beatty et al.* (1981), 34 O.R. (2d) 385.)

31. In *CN/CP*, the employer had for many years gratuitously paid wages to certain employees more generous than those required by the terms of successive collective agreements. The arbitrator found that the employer had followed a course of conduct which had reasonably induced the union to believe that the entitlement of the employees concerned would be governed by the company's longstanding practice rather than the strict language of the agreement. He concluded that it would be inequitable to allow the employer to insist on the letter of the agreement as the limit of its obligation - even though it appears that the employer's practice was based upon a mistake, there was no express undertaking, promise or assurance of the kind that the courts have frequently found necessary, and no intention on the employer's part to affect the parties' legal relations. And what was the change of position or detrimental reliance resulting from the longstanding payment of a gratuitous *benefit*? How could the mistaken payment of a benefit be construed as a detriment? The arbitrator's answer was this: the union had lost, for the duration of the agreement, the opportunity to negotiate a change in the terms of the agreement to embody the practice in express contract language. The union's vice-president had testified that had he known of the employer's intention to effect the change, or even that the employer was reserving its right to do so, he would have insisted on a clause in the agreement precluding the employer from carrying out its plan. In the arbitrator's opinion, this loss of a bargaining *opportunity* was sufficient detrimental reliance to found an estoppel and compel continuance of the status quo, even though it is by no means clear that the union could have ever secured that right in the agreement had it been raised at the bargaining table.

32. *CN/CP* broke new ground. To adopt the medieval metaphor so often used in these cases, the arbitrator had permitted the union to use estoppel as a 'sword': the foundation of an enforceable legal claim to benefits beyond those provided in the agreement, despite the absence of any *express* promise or undertaking, nothing in the agreement to which the union could refer to support its position, and no obvious intention to alter the parties' legal relationship. There was no reference to the statements in *Combe v. Combe*, *supra*, that estoppel does not create new causes of action where none existed before, nor was there any reference to the comment of the Ontario Court of Appeal in *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 O.R. (2d) 19 to the effect that: "Estoppel can never be used as a sword but only as a shield. A plaintiff cannot sound his claim in estoppel." The sword/shield distinction did not trouble the Divisional Court either. *Gilbert Steel* was not mentioned. Nor was the arbitrator or the Court troubled by the fact that they were sanctioning a new, unwritten, but enforceable term of the collective agreement despite the statutory requirement that the collective agreement be in writing. In summary, then, at least in Ontario, a party's rights under a collective agreement consist of its written terms in addition to, or as modified by, such unwritten practices as may, in the opinion of an arbitrator, support this broader notion of estoppel. The negotiated terms of the agreement are no longer determinative.

33. We do not think that any useful purpose would be served by our attempt to analyse the sword/shield distinction, for despite *Gilbert Steel*, the recent High Court decisions are as difficult to reconcile as Reid, J. suggests. In *Re Tudale Exploration Limited and Bruce et al.* (1978), 20 O.R. (2d) 593 (Div.Ct.), Grange, J. commented that "The sword/shield maxim has been heavily criticized...and I must confess to difficulty in seeing the logic of the distinction and it does not appear to be universally applied". In *M.L. Baxter Equipment Ltd. et al. v. Geac (Canada) Ltd.* (1982), 36 O.R. (2d) 150, Rutherford, J. commented that "the next limitation is that the doctrine can be used only as a defence and not for the purpose of asserting a claim. Recently, however, great doubt has been cast on this requirement". Yet, each of these cases could be resolved along traditional estoppel lines, without reference to "swords" and "shields", and in *Parker v. Constitution Insurance Co.*

of *Canada* (1983), 43 O.R. (2d) 545, Mahoney, J. asserted: "It is trite law that estoppel can be used only as a sword and not as a shield", citing *Gilbert Steel* as authority. None of them involved collective agreements or labour law principles.

34. Of more interest are the comments of Reid J. in the *Municipality of Metropolitan Toronto* case, *supra* about the extent to which the arbitral use of estoppel has received judicial approval:

To the extent that arbitrator's [sic] use of the doctrine [of estoppel] has come before this court its application has been confined to one type of case only. That is where a course of conduct has been followed by an employer which is at odds with the agreement that has led the union not to seek to have the agreement amended to accord with the conduct.

Since it was the union which was asserting estoppel in *Municipality of Metropolitan Toronto*, and it is the employers that are doing so here, it may be useful for present purposes, to rephrase Reid J.'s comments juxtaposing the parties:

To the extent that arbitrator's [sic] use of the doctrine [of estoppel] has come before this court, its application has been confined to one type of case only. That is where a course of conduct has been followed by a [trade union] which is at odds with the agreement but has led the [employer] not to seek to have the agreement amended to accord with the conduct.

If one accepts Reid J.'s statement as defining the judicially approved ambit of estoppel in collective agreement situations, it is apparent that it cannot apply in the instant case. Here, the union's conduct is not "at odds" with the agreement, but rather in accordance with its terms, and both MCAW and MCAO have tried to seek contractual amendments to entrench the employers' right to name-hire.

VII

35. There is little doubt that the decision in *CN/CP*, *supra*, has significantly broadened the potential availability of estoppel as a basis for asserting a claim that cannot be supported on the basis of the language of the collective agreement alone. In a proper case, conduct (apparently even based upon a mistake) can amount to a representation, and detrimental reliance can be founded upon a loss of opportunity to negotiate an amendment. But the question, as always, is whether the particular circumstances demonstrate a "proper case" for the application of estoppel, and arbitrators have been far from unanimous even on facts similar to those before arbitrator Beatty in *CN/CP*.

36. We should note first of all that the decision in *CN/CP* has been heavily criticized on both legal and policy grounds. In *Re Monarch Foods*, *supra*, Professor Schiff argued that *CN/CP* does not properly interpret the law, approves the enforcement of amendments to the collective agreement which were neither negotiated nor reduced to writing, and ignores the necessity of intent to alter legal relations. He argues that estoppel could not arise out of an error because error can never embody intent. Other arbitrators have also been apprehensive about a written agreement becoming encrusted with informal understandings which do not merely assist in its interpretation but add to or qualify the rights or obligations of the parties. Any retreat from the writing which the statute requires, generates uncertainty, friction, and litigation.

37. In *Re Elan Tool and Dye Ltd. and U.A.W. Local 127* (1985), 18 L.A.C. (3d) 17 (Weatherill), for example, the company had a practice of permitting employees to stop working before the end of their scheduled shift if their daily production quota had been met. The company changed certain aspects of that practice and the union grieved. The arbitrator denied that he had the broad equitable jurisdiction to invoke estoppel as a "sword" and commented:

It is one thing to be prevented, in certain circumstances, from relying on terms of a collective agreement because it is unjust to do so; it is quite another to assert that because of the conduct of one party and because of the others reliance on it, the terms of the collective agreement have been changed, or a new term created.

The arbitrator insisted that no representation intending to effect legal relations had been made by the mere fact of a past practice of exercising management rights in a particular way; otherwise, all company practices might regularly become part of the collective agreement.

38. This decision, it might be noted, is entirely consistent with one made ten years earlier by Arbitrator G.W. Adams in *Re Fisher Controls Co. of Canada Ltd. and United Autoworkers, Local 636* (1977), 16 L.A.C. (2d) 299. There, the union protested the employer's action in eliminating a ten minute rest period which had previously been allowed to employees working a four-hour overtime shift. The collective agreement was silent on the subject of such breaks, and the Board rejected the claim which was based "on a gratuitous promise...existing entirely outside of and unrelated to the collective agreement". The decisions in *Elan Tool* and *Fisher Control* are also consistent with the views of Professor Harry Arthurs in the *City of Toronto* which is mentioned in *City of Penticton, supra*, and cited with approval by the Alberta Court of Appeal in *Re Smokey River Coal Ltd. and USW Local 7621 et al.*, (1985) D.L.R. (4th) 742.

39. In *Smokey River Coal* the employer had a practice of paying small amounts of overtime in circumstances neither required nor contemplated by the collective agreement. When the employer discontinued the practice the union grieved, relying successfully on the principle of estoppel. The Court of Appeal disagreed. At pages 745-746 of the reasons Mr. Justice Stephenson had this to say:

But, the creation of positive obligations is not the office of promissory estoppel. The function of promissory estoppel is not to make gratuitous promises binding in all respects. The effect of promissory estoppel was the subject of consideration by the Supreme Court of Canada in *Canadian Superior Oil Ltd. et al. v. Paddon-Hughes Development Co. Ltd. et al.* (1970), 12 D.L.R. (3d) 247 at p. 252, [1970] S.C.R. 932 at p. 938, 74 W.W.R. 356 sub nom. *Canadian Superior Oil Ltd. et al. v. Hambly et al.*, where Martland J. says;

"This principle [promissory estoppel] assumes the existence of a legal relationship between the parties when the representation is made. It applies where a party to a contract represents to the other party that the former will not enforce his strict legal rights under it."

The doctrine may afford a defence against the enforcement of otherwise enforceable rights; it cannot create a cause of action": per Buckley J. in *Beesly v. Hallwood Estates Ltd.*, [1960] 2 All E.R. 314 at p. 324, quoted by Spencer Bower and Turner, *Estoppel by Representation*, 3rd ed. (1977), at p.388. Gratuitous promises or assurances cannot be turned into positive, binding, obligations.

Much of the argument before us was directed towards the question of whether the doctrine could be employed only as a "shield" rather than a "sword", or only invoked by a defendant. I do not find the sword-shield distinction helpful here, not is the doctrine's availability to be decided by the happenstance of who sues whom. Nevertheless, when the doctrine of promissory estoppel is applicable. "It only prevents a party from insisting on his strict legal right...": *Combe v. Combe*, [1951] 1 All E.R. 767 at p. 769. So an employer might be precluded from relying on the terms of an agreement where he had given an assurance that he would not do so. What is necessary to raise promissory estoppel is described by the Privy Council in *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*, [1964] 1 W.L.R. 1236 AT P. 1328, quoting Bowen L.J.:

"...if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those per-

sons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before."

The arbitrator here said that the union was induced to believe that the hours of work and wages stipulated under the collective agreement would not be strictly observed. The practice, however, does not appear inconsistent with any provision of the agreement relating to hours of work and wages. What was done was not in contravention of any of the terms of the agreement, but rather in the exercise of them. The employer could seek, or, in some cases, require, additional time, but it had to pay overtime rates. The practice appears to have been in compliance with those terms of the agreement.

At the root this is a bald attempt to turn a policy or practice into a term of a contract when the parties never bargained that it be such.

The Court agreed with the comments of Dr. Hickling that *CN/CP* "runs counter to a line of both traditional and arbitral authority which has refused to give effect to a claim based directly on promissory estoppel" (see: "*Labouring with Promissory Estoppel: A Well-Worked Doctrine Working Well*", (1985) 17 UBCL Rev. 183); and after referring to *Municipality of Metropolitan Toronto*, *supra*, the Court, went on:

Moreover, the essence of the doctrine of promissory estoppel is that it is inequitable for the promisor to stand on his rights. The subject is discussed by Spencer Bower and Turner, *cit* above, at s. 352. It is only "inequitable for a promisor to stand on his strict legal rights where the promisee has altered his position in reliance on the promise". I am unable to see how the union or its employees were induced to alter their positions in reliance on the promise. The promise was to pay three-quarters of an hour for half an hour of work. What the arbitrator fastens upon is the fact that the union did not raise the practice in subsequent negotiations "...its reliance upon the practice caused it not to seek formulation of the practice in the collective agreement". There is simply no evidence that the union failed to raise the subject at negotiations in reliance on anything the company had promised. I agree with Professor Arthurs in *Re Civic Employees Union, Local 43 and City of Toronto* (1967), 18 L.A.C. 273 at p. 280, where he says of this kind of claim that the union has incurred neither risk nor detriment; there must be evidence that the union surrendered some claim or made a concession in reliance on the policy or that it would have tried to incorporate the promise into the agreement. To the same effect are authorities cited by Hickling, *above*, at pp. 206-7, and the Ontario Divisional Court decision in *Metropolitan Toronto Civic Employees' Union, Local 43 v. Toronto*. The arbitrator here erred in making the finding of inducement or "change of position" without evidence to support that conclusion.

40. Many arbitrators (despite *CN/CP*) have been equally reluctant to abridge management rights by estoppel unless a clear promise can be found, and conduct, no matter how consistent or how long continued has not been enough. The classic case is *Re Rothmans Pall Mall Canada and Bakery Workers' International Union* (1983), 12 L.A.C. (3d) 329 (Picher). There the employer had a longstanding practice of replacing workers temporarily absent. Because of changes in product demand, it altered this practice, replacing workers only where it felt they were necessary. The union grieved, but the arbitrator concluded:

...The evidence does not establish either a verbal representation made by the company during bargaining or silent acquiescence to some representation made by the union....The most that can be said is that before and during negotiations that practice continued as a longstanding exercise of the company's discretion which because of favourable production requirements, had always operated to the benefit of the employees. When sales and production figures became less favourable, the company altered its practice...a practice maintained in good times is not a promise that the same practice will be maintained in less prosperous time.

The arbitrator likened the practice to a Christmas turkey and was reluctant to say that because a

practice had continued for years it must of necessity be retained or become a legally enforceable requirement.

41. A similar result was reached in *Re Victoria Colonist* (1985), 17 L.A.C. (3d) 284 (Hope) where the employer had continued the salary of employees who took leave to serve on the negotiating team even though the collective agreement did not require it. When the employer sought to end these salary payments, the union grieved. The arbitrator found no evidence of a representation but merely "forbearance" in the *ex gratia* payment. Likewise, in *Re Western Pulp Inc. and Pulp, Paper and Woodworkers of Canada Local 3* (1984), 17 L.A.C. 3rd 228 (McIntyre), the Board made the same distinction as Arbitrator Weatherill in *Re Elan Tool and Dye Limited, supra*, distinguishing between the use of past practice as a guide to interpretation where there is ambiguity and the use of past practice to establish an estoppel or amend the collective agreement. The Board held that where estoppel is claimed there should be clear evidence that the grievor party refrained from bargaining on the issue because of reliance on the past practice. In *The Queen in Right of Canada, Treasury Board, Little and Bell v. Canadian Air Traffic Controllers Association* (1984), 1 FC 1081 a 15 year practice was insufficient to persuade the Federal Court of Appeal of that.

42. In *Re Brewers' Warehousing Co. Ltd. and United Workers' Provincial Board* (1985), 21 L.A.C. (3d) 327 (Brunner) the arbitrator refused to direct the employer to reinstate a longstanding practice of permitting employees to punch out early which the employer had suspended for economic reasons. He concluded that the practice was a mere "indulgence" and not a representation "at odds" or "inconsistent" with any of the express terms of the agreement. While it was not necessary to consider the other elements of estoppel, the arbitrator was moved to write:

Because of this conclusion I do not find it necessary to deal with the other submissions that were made by counsel and in particular I need not address the contention that there was no evidence of "detrimental reliance". Nor is it strictly speaking necessary for me to comment on the preliminary objection that the grievance does not raise a difference between the parties arising from the interpretation, application, administration or alleged violation of the agreement and hence is not arbitrable. However, in this respect, the words of Mr. Justice Stevenson in *Re Smoky River Coal Ltd. and U.S.W., Local 762I, supra*, that the creation of positive obligations is not the office of promissory estoppel and the statement that gratuitous promises or assurances cannot be turned into a positive binding obligation or into a term of the contract when the parties never bargained for such, are most apposite and do tend to indicate that the grievance as framed may well not raise a difference between the parties which is arbitrable under s.45 of the *Labour Relations Act*.

By contrast, in *Re Domglas Inc. and United Glass and Ceramic Workers, Local 203* (1983), 9 L.A.C. (3d) 124 (Kennedy), another experienced arbitrator held that the employer must continue its longstanding practice of paid lunch breaks even though the terms of the agreement did not require it. *CN/CP* was applied uncritically and, on the assumption (which the dissenting board member called pure "conjecture") that had the employer prior to negotiations alerted the union of its intention to alter its practice, the issue would have been on the union's "shopping list" of bargaining items. Again, as in *CN/CP* itself, there was no indication that the union would have been successful in pressing this claim. *Domglas* is representative of a number of similar decisions.

43. Finally, we should make brief mention of *Re Ottawa General Hospital and Ontario Nurses' Association, Local 83* (1985), 18 L.A.C. (3d) 208 (Roach). In that case, there had been a practice of paying holiday pay at a level more generous than the collective agreement required, and the union had attempted at the bargaining table to entrench that practice in the collective agreement. It had been unsuccessful. When the employer later reverted to the terms of the agreement and the union grieved, the arbitrator held that no estoppel could be made out because there

was no detrimental reliance. In particular, there was no “inaction” as a result of the representation:

Again, I would like to emphasize that the association, having negotiated the holiday pay issue during the bargaining session, which resulted in the present agreement, cannot now claim that it acted to its detriment by reason of the conduct of the hospital in respect of payment of holidays. The fact that it was unsuccessful in bringing about a change during the negotiations, is not relevant. What is relevant is that the association cannot claim that it failed to act by reason of the hospital's conduct, and this is a decisive factor since one of the essential elements to prove estoppel is missing.

Because the union had actually raised the matter in bargaining, it could not claim that it had lost the opportunity to do so, and the arbitrator held that the *CN/CP* rationale had no application.

44. We have referred at such length to this arbitral jurisprudence, because these cases typically involved collective agreements with a management rights clause giving the employer the exclusive authority to run the business except as expressly restricted by the collective agreement (like Article 10 in the agreement before us), and there was usually a further provision (like Article 18.6 in the master portion of the current agreement) to the effect that the arbitrator may not “make any decision inconsistent with the provisions of [the agreement] nor alter, modify or amend any part of the agreement”. Not only did the labour statutes require collective agreements to be in writing, but, to the extent that the parties’ intention could be gleaned from the language they used, there was no intention to vest in an arbitrator the power to rewrite the bargain or create obligations to which the parties had not mutually agreed. Nevertheless, courts and many arbitrators have been prepared to invoke the doctrine of estoppel both to limit the exercise of these management rights, and impose upon employers obligations beyond those contained in the collective agreement. What is interesting in the instant case is that by making the union the “sole agent for supplying employees” without limitation on how those workers are to be supplied, the employers have recognized a “union right” of the same general nature as the employer’s right to run its business. Just as these employer practices initiated and maintained in the exercise of their management rights could, by means of estoppel, become transformed into a binding obligation to maintain practices unsupported by the language of the agreement, it is arguable that the union’s exercise of its rights might yield the same result. For years the union was prepared to acquiescence in and facilitate the employer’s desire to name-hire, and, the employers argue that the union now has a legal obligation to continue to do so.

45. We shall consider the potential interplay of the employers’ “reserved right” to hire and the union’s exclusive right to “refer” in the last paragraph of this decision. First, it is necessary to determine whether the circumstances of this case would be sufficient to establish an estoppel, which obligates the union to continue to issue referral slips validating the employers’ desired practice of name-hiring their employees.

VIII

46. There has never been any express promise, assurance or undertaking that the union would abandon its role, recognized in the agreement, as the “sole agent for supplying employees”, nor has there been any express promise that, in all circumstances, the union will routinely ratify (by the issuance of a referral slip) any employer decision to select any employee. Whatever inferences might be drawn from the union’s acquiescence in a system of name-hire were surely dispelled by its express repudiation of that practice between 1973 and 1975. The union’s refusal to permit unlimited “name-hire” for a period of perhaps two years and its refusal to agree to a contract term to that effect, demonstrates that, whatever indulgence or forbearance it was prepared to extend from time to time, it was *not* intended to modify the legal relations between the parties. Indeed, the employers were on notice that the practice of name-hire would *not* be accepted indefinitely and

without question by the union. The employers themselves were under no illusion about this. That is why they tried to modify the collective agreement to give contractual force to a scheme which they knew, or ought to have known, might be altered by the union when it considered it appropriate to do so. They were unsuccessful.

47. This is not a case in which a party, relying on an established practice, has lost the opportunity to negotiate contract language to give that practice contractual force. The Windsor contractors did have the opportunity to change the contract language to meet their expectations. Later, on their behalf, MCAO also tried to introduce language in the provincial collective agreement to institutionalize the “open hiring” system which the Windsor contractors now claim they are entitled to on the basis of estoppel. MCAO was equally unsuccessful. In short, what the Windsor contractors urge the Board to do is modify the terms of their collective agreement and establish, by estoppel, a term which neither they, nor their statutory bargaining agent, were able to secure through the process of collective bargaining.

48. What of other forms of detrimental reliance? We are prepared to assume (in the absence of evidence) that the loss of an employer’s ability to hand-pick his crews (either independently or from the union’s list of unemployed workers) may have some impact on the employees’ productivity, but it is interesting to note that there is no concrete evidence in this regard, even though, by the time the hearing was completed the “50/50 system” had been in place for approximately six months. The employers, quite understandably were concerned about their inability to pick and choose among the available union members, but it has not been established that the requirement to take a *qualified* tradesman from the out-of-work list for every tradesman name-hired has actually resulted in any loss to the employers. More important, however, we are not persuaded that there was an unequivocal representation by conduct that the union would always acquiesce in name-hiring; there was a clear representation that it would not do so, there was no loss of opportunity to bargain about the issue locally or provincially, and if the Windsor contractors have failed to press their case more strongly at the bargaining table, it is not because of any assurance from the union. If the members of MCAW relied upon the existing practice it was not reasonable for them to do so, having been clearly put on notice that the union did *not* intend it to affect the legal relations between them. This case does not fit the rationale of *CN/CP* nor the re-statement of the doctrine by Reid J. in *Municipality of Metropolitan Toronto*, *supra*. There is no union conduct here that is “at odds” with the agreement, and the employers have neither been induced to refrain, nor have they refrained from seeking to secure a contractual provision mandating “open hiring”.

49. For these reasons, we do not find that the elements of an estoppel have been made out and decline to direct that the union continue to ratify a practice which is not supported nor required by the language of the collective agreement. In our view, having clearly put the employers on notice that they could not rely upon a continuation of their unfettered right to name-hire and having resisted the employers’ claim to embody that right in the terms of the collective agreement (both locally, and later, at the provincial level) the union cannot be estopped from introducing hiring practices which, in its view, accommodate its members’ need for a fair opportunity to compete for available jobs.

50. Does this decision mean that the Windsor employers must hire anyone whom the union refers? Not necessarily. The fact that the union (in accordance with the agreement) has been given the exclusive right to refer workers, does not mean that the employer is obligated to employ those workers if they do not meet its requirements; and, in assessing the required standards of performance, an employer is entitled to take into account how these very same workers have performed in the past. The referral rights that have been vested in the union pursuant to Article 101 of the

Windsor Appendix, must be balanced against the right to hire found in Article 10 of the master portion of the agreement; and it could never have been intended that the employers were required to *hire* or retain persons who were incompetent or unable to demonstrate their ability to perform the tasks required of them. As the Board noted in *Ontario Hydro*, [1983] OLRB Rep. Jan. 99, and [1984] OLRB Rep. Feb. 299, even in a union-run *referral* system, there is no obligation on an employer to hire an unsuitable employee. If through past experience with an employee an employer has formed the reasonable impression that he will be unable to perform his assigned tasks in a satisfactory manner, the employer may well be justified in refusing to hire him. The extent of that employee's redress (if any) will depend upon the language of the collective agreement and the circumstances of the particular case, so it is inappropriate for this Board to speculate. It suffices to say that the employers' concern about productivity can, with appropriate justification, be addressed pursuant the collective agreement, and in this respect, the union's right to refer workers to available jobs is tempered by the employers' right to reject persons who are unsuitable. This puts in the hands of the employers the ability to avoid any actual detriment resulting from any unreasonable exercise of the union's right to refer.

51. For the foregoing reasons, this grievance is dismissed.

0860-86-U Metropolitan Plumbing and Heating Contractors Association, A Division of the Mechanical Contractors Association Toronto, Applicant, v. Sean O'Ryan; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing & Heating Ltd.; Municipal Plumbing & Heating Ltd., Respondents

Construction Industry - Practice and Procedure - Strike - Application under s. 135 claiming individual bargaining violated s. 131 - Not properly filed under s. 135 - Single Vice-Chairman not having jurisdiction to hear

BEFORE: *Harry Freedman*, Vice-Chairman.

APPEARANCES: *S. C. Bernardo, Derwent Lewis, Jack McCarron and Frank Michelucci* on behalf of the applicant; *Laurence C. Arnold and Chris Thurrett* on behalf of Sean O'Ryan and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; *M. E. Geiger, M. Z. Rosenbaum, E. J. Winter, Howard Roher, Bruno Bortolus and Luo Pupolin* on behalf of the corporate respondents.

DECISION OF THE BOARD; June 30, 1986

1. This application for relief under section 135 of the *Labour Relations Act* was filed in the morning of June 26, 1986 and came on for hearing before me in the afternoon of June 27, 1986.

2. Counsel for the corporate respondents challenged the authority of counsel for the applicant to act on behalf of the applicant on the basis that Mr. Geiger's clients, who are members of

the applicant and play a significant role in the affairs of the applicant, did not retain Mr. Bernardo or authorize this application.

3. Counsel for the respondent union and Sean O’Ryan took no position with respect to the applicant’s authority to make this application, but requested an adjournment. Mr. Arnold also suggested that this application was not properly before the Board under section 135 of the Act. Mr. Geiger supported the position of Mr. Arnold.

4. Counsel for the applicant advised me that the officers of the applicant with the authority to initiate proceedings before the Board on behalf of the applicant had retained him to act in this matter. While counsel submitted that this matter was very urgent and should be heard on June 27th, he did not oppose adjourning this hearing until next week, suggesting Wednesday July 2nd or Thursday July 3rd and also suggested that three members of the Board be assigned to deal with this matter.

5. At the conclusion of the opening submissions from all counsel, I asked counsel for the applicant if he was content to proceed with this matter as an unfair labour practice complaint under section 89 of the Act to be scheduled for hearing by the Registrar or if he wanted it to proceed before the Board under section 135 of the Act. After a brief recess, counsel advised me that the applicant wished to proceed with the matter under section 135. I therefore heard argument from all counsel as to whether this application was properly before me as an application under section 135 of the Act. Following the conclusion of argument, I recessed and then returned and gave the following decision orally at the hearing:

This is an application made under section 135 of the *Labour Relations Act* for a broad range of relief that arises out of the corporate respondents entering into an agreement with the respondent union. The applicant is an accredited employers’ organization. The corporate respondents are members of the applicant. The respondent union holds bargaining rights for the employees of the applicant’s members and bargains with the applicant.

While there were a number of procedural and preliminary matters raised, I asked counsel for the applicant what section or sections of the Act are alleged to have been violated by the respondents. He advised me that the application made under section 135 of the Act is based on alleged violations of section 131 of the Act. I therefore directed the parties to deal with the preliminary issue that was of some concern to me, that is, whether I had the jurisdiction under section 135 to hear an application for relief based on alleged violations of section 131.

Section 135(1) of the Act provides:

“Where, on the complaint of an ... employers’ organization, the Board is satisfied that a trade union ... called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union ... counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, it may direct what action, if any, a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.”

Section 131 of the Act provides:

“(1) No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers’ organization and no such employer or person acting on behalf of such employer, trade union or council of trade unions shall, so long as the accredited employers’ organization continues to be entitled to represent the employers in a unit of employers, bargain with each other with respect to such employees or enter into a collective agreement designed or intended to be binding upon such employees and if any such agreement is entered into it is void.

(2) No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers’ organization and no such employer or person acting on behalf of the employer, trade union or council of trade unions shall, so long as the accredited employers’ organization continues to be entitled to represent the employers in a unit of employers, enter into any agreement or understanding, oral or written, that provides for the supply of employees during a legal strike or lock-out, and if any such agreement or understanding is entered into it is void and no such trade union or council of trade unions or person shall supply such employees to the employer.

(3) Nothing in this Act prohibits an employer, represented by an accredited employers’ organization, from continuing or attempting to continue his operations during a strike or lock-out involving employees of employers represented by the accredited employers’ organization.”

Counsel for the applicant submits that once a legal strike occurred, as was the case here, any conduct that prejudicially affected the bargaining between the applicant and the respondent union can be remedied under section 135.

It was agreed before me that the members of the respondent union employed by the corporate respondents went back to work after the agreement with the union was signed. The applicant did not allege, and was unaware of any of its other members not having the respondent union’s members working for them.

In my view, since the employees who engaged in a strike against the members of the applicant are back at work, there is no longer a strike taking place.

An alleged violation of section 131 is similar to an allegation that section 146 of the *Labour Relations Act*, in respect of province-wide bargaining, has been contravened. The Board in *Sikora Mechanical Ltd.*, [1982] OLRB Rep. June 941 specifically held that a violation of section 146 could be remedied under section 89. The Board declined in that case to grant any relief under section 135. In *Quinard Ltd.*, [1982] OLRB Rep. July 1054 an application was made before the Board under both section 135 and section 89 of the Act in respect of entering into an agreement or arrangement contrary to section 146. In that case, the Board specifically held that no violation of the Act was established for which relief could be granted under section 135.

Any doubt about whether section 135 can apply to an allegation of a violation of section 131 is removed when one considers the amendment to the Act in 1984, by which section 135(2a) was added. In my view, that amendment deals with the making of other arrangements contrary to section 146, a section similar in import to section 131. There was no need for the Legislature

to enact section 135(2a) if section 135 applied to the kind of allegations made in the application that is before me.

I have no doubt that this is a very serious matter that strikes at the heart of the accreditation bargaining system in the construction industry. The issues in this case appear to be complex, and the applicant alleges that the matter must be urgently dealt with.

Even if I assume that the applicant has made out its case for urgency, that alone cannot give me the authority to deal with the matter under section 135. Rather, the urgency alleged must be raised with the Board if and when the applicant brings a complaint under section 89 of the Act in respect of this matter.

Since this was an application under section 135 that raises matters outside the scope of section 135, I, as a Vice-Chairman of the Board sitting alone pursuant to section 102(12) of the *Labour Relations Act*, do not have the jurisdiction to deal with the application as made.

Therefore, this application is hereby dismissed.

3299-84-M CUPE - CLC, Ontario Hydro Employees Union, Local 1000, Applicant, v. Ontario Hydro (Bancroft Area), Respondent

Dependent Contractor - Employee - Whether tree removers dependent contractors - Whether economic dependency need derive from contract - Reason for dependency irrelevant

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *R. Ross Wells* for the applicant; *John B. West* for the respondent.

DECISION OF PATRICIA HUGHES, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; June 4, 1986

1. The applicant, CUPE - CLC, Ontario Hydro Employee Union, Local 1000 ("the union"), seeks a declaration under section 106(2) of the *Labour Relations Act*, ("the Act") that Dwayne Unger and David Sarginson are dependent contractors for the respondent, Ontario Hydro (Bancroft Area) ("Hydro").

2. Unger and Sarginson are engaged in the work of removing trees which pose a danger because they are close to power lines. During the operative period, they had entered into a contract with Hydro to carry out "danger tree removal". The contract was for the period February 18, 1985 to March 29, 1985 and provided that Unger and Sarginson were to cut down 1,085 trees which had been marked by Hydro for removal. The union argues that Unger and Sarginson are dependent contractors working for Hydro as their employer, while Hydro maintains they are independent contractors.

3. The Labour Relations Officer appointed to inquire into this matter met with the parties on December 17, 1985. It was agreed that the evidence of Dwayne Unger would stand for both himself and David Sarginson. The Officer's Report, dated January 30, 1986, was the subject of representations by the union and Hydro before us on April 15, 1986. At the hearing, counsel for the union did not pursue the union's original claim that Unger and Sarginson were employees of Hydro, but restricted his submissions to the claim that Unger and Sarginson are dependent contractors.

4. There was no argument before us, nor was there any suggestion in the evidence, that there was a potential employer other than Hydro. Accordingly, if the disputed individuals are dependent contractors, we conclude that Hydro is their employer.

5. Prior to 1975, the status of an individual as an employee or independent contractor had to be determined by reference to common law tests. However, in that year, the Ontario *Labour Relations Act* was amended to establish as a distinct category a "new" type of individual who was in fact neither employee nor independent contractor but possessed characteristics of both: the dependent contractor. Section 1(1)(h) of the Act provides that

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms or conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

The significance of a determination that a particular person is a dependent contractor is found in section 1(1)(i) of the Act which states that an "employee" includes a dependent contractor". Consequently, an individual who has been declared a dependent contractor enjoys the same protections under the Act as a traditional employee, including the opportunity to join a union and engage in collective action.

6. Neither Unger nor Sarginson intervened in the instant application, nor did Unger indicate expressly in evidence whether they preferred to be dependent or independent contractors. In any case, it is the Board's responsibility to determine their status on the basis of appropriate criteria, keeping in mind the purpose of the amendment as expressed in *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197:

23. ...The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

24. This re-definition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship.

7. The dependent contractor straddles the world of the traditional employee and the world of the individual entrepreneur. Not quite one or the other, the dependent contractor will have attributes of both - or, more accurately, - his or her relationship with the alleged employer will possess attributes of both. This understanding of the dependent contractor's position is evident both in the term itself and in the definition under section 1(1)(h) of the Act. While the individual may be a contractor in form (and in some essential aspects of the relationship), he or she may have little actual discretion or freedom in dealing with the employer. The definition clearly indicates that while the individual is neither employee nor independent contractor, he or she resembles the

employee more than the independent contractor. It is not therefore surprising that in most cases, the disputed individuals in some respects resemble employees and in other respects resemble independent contractors. Counsel for the union, in an approach endorsed by counsel for Hydro, suggested we envision a continuum with “employees” at one end and “independent contractors” at the other end with a line through the middle. We must decide on which side of the line Unger and Sarginson are to be most appropriately placed. As the Board said in the *Cupido Haulage* case, [1980] OLRB Rep. May 679 at paragraph 17, “[t]he statutory definition forces the Board to engage in a comparative exercise; to determine on which side of an imaginary line between independent contractor and employee the disputed persons fall”. We are not required to find that Unger and Sarginson have the same characteristics as an employee performing the same work would have, but only that the characteristics of their work environment have more in common with an employee’s working environment than with an independent contractor’s working environment.

8. Each counsel referred to one case in particular to support his submissions. Counsel for Hydro suggested that the *indicia* set out in the *Algonquin Tavern* case, [1981] OLRB Rep. Aug. 1057 at paragraph 64 are especially helpful and that on those *indicia*, Unger and Sarginson are independent contractors. Counsel for the union placed heavy emphasis on *Cradleship Creche*, [1986] OLRB Rep. Feb. 225. While the principles enunciated in both those cases are, of course, relevant to our inquiry, the facts in both of them are quite different than the facts here. *Algonquin Tavern* concerned the status of burlesque entertainers. With one exception, the entertainers involved worked for the purported employer taverns or hotels for only brief periods, usually no longer than a week, with little or no subsequent employment by the same tavern or hotel. The Board therefore found that the “principal ... question is whether the dancers are to be regarded as ‘self-employed’ or ‘employees’ of the various hotels at which they work from time to time”. It concluded that the dancers were self-employed. In *Cradleship Creche*, the issue was whether persons who provided child care in their homes through the agency services of the Creche were employees of the Creche, dependent contractors working for the Creche or independent contractors. The providers were found to be dependent contractors by the majority of the Board. The obligations of and opportunity for extra work by the providers were in large part determined by statute, the *Day Nurseries Act*, and fees were established unilaterally by the Municipality of Metropolitan Toronto. On the other hand, the facts here are similar (although certainly not identical) to the kind of facts in evidence in the “truck driver cases” to which both counsel also referred. Accordingly, we considered the following cases in detail: *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806; *Sherman Sand Gravel Ltd.*, [1978] OLRB Rep. May 459; *Superior Sand, Gravel & Supplies Ltd.*, [1978] OLRB Rep. Feb. 119; *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104; and *Indusmin Limited*, [1977] OLRB Rep. Sept. 552. Apart from *Indusmin*, all these cases were provided the Board by counsel for Hydro, in addition to other related material. Counsel for the union also asked the Board to consider the *Dominion Dairies Limited* case, [1978] OLRB Rep. Dec. 1083. One of the major distinctions between some of these cases and the instant case is that the drivers had to deal with customers as well as the entity with which they contracted. However, the relationship with customers was not determinative of the status of the drivers, and it is not considered further here. Another distinction is that the owner-drivers are generally in on-going relationships with the employer, while Unger and Sarginson were engaged in a series of short-term contracts. However, as considered below, the timing of the Unger and Sarginson contracts was such that the relationship was tantamount to an on-going relationship.

9. While a series of *indicia* may be useful in determining whether disputed individuals are dependent contractors, section 1(1)(h) of the statute itself establishes the two major criteria of (a) economic dependency and (b) an obligation to perform duties resembling more those owed by an employee than those owed by an independent contractor. In this case, then, we must answer the following questions:

(a) to what extent are Unger and Sarginson economically dependent on Hydro and what is the nature of that dependency; and

(b) what is the nature of the duties owed by Unger and Sarginson to Hydro?

10. With respect to economic dependency, we are particularly concerned about the percentage of work performed for Hydro and the opportunity available to Unger entrepreneurial activity; the selling of one's services to the market; and economic mobility.

11. With respect to the nature of the duties owed, we need to consider the degree of control exercised by Hydro over the way the job is to be done, including training; the extent of supervision on an ongoing basis; the method of the determination of the amount of the contract; the method of payment; and whether Unger and Sarginson themselves hire employees. The *Algonquin Tavern indicia* most relevant to these factors are: the use of substitutes; evidence of variations in fees or the ability to bargain fees; the degree of specialization involved; the *right* (rather than ability) to control the work; the magnitude of the contract amount, terms, and manner of payment; the degree of integration into the employing unit, and the similarity between the work done by Unger and Sarginson and that done by acknowledged employees. In considering the second statutory criterion, the majority in *Cradleship Creche* reviewed the extent to which the providers could refuse work, the method of payment, training, regular supervisory visits and discipline exerted by the Creche over the providers. While it is obvious that these factors cannot be clearly allocated to one or the other of the major statutory criteria, they do provide points of reference by which to organize and assess the evidence.

Degree of economic dependency on Hydro

12. Unger and Sarginson are in fact entirely dependent on Hydro for their income. Unger testified that they do 100% of their business with Hydro. Thus, if the test were the nature of the economic relationship *in fact*, there would be no question that the first criterion under section 1(1)(h) of the Act would be satisfied and the status of Unger and Sarginson would depend on the nature of the duties they performed for Hydro. However, counsel for Hydro maintained that the test is not actual dependency but the reason for it. He argued that since it was Unger and Sarginson's own choice to restrict their work to Hydro, and that dependency did not derive from the contract itself, the first criterion was not satisfied. In other words, since Unger and Sarginson *could* work for other persons, they were not economically dependent on Hydro within the meaning of section 1(1)(h) of the Act. He cited *The Citizen* case, [1985] OLRB Rep. June 819 to support his position. In that case, the Board stated that "the economic dependence necessary under the definition in section 1(1)(h) of the Act must flow from the terms and conditions of the relationship between the parties". There was nothing explicit or implicit which prevented the drivers for The Citizen from seeking income elsewhere, although the only actual source of income was The Citizen for whom the drivers distributed papers. Counsel for Hydro correctly pointed out that there was no restriction on Unger and Sarginson imposed by Hydro with respect to earning income from other sources. They had made their own choice to work only for Hydro. There was no evidence about what would happen if Unger and Sarginson worked for someone else or were not available when Hydro required them. In contrast, in *Nelson Crushed Stone*, *supra*, for example, there was evidence that a driver who refused to accept a particular load of crushed stone would be "shown the gate".

13. Counsel for the union argued that *Cradleship Creche* supports his view that the reason for the dependency is irrelevant. In *Cradleship Creche*, the demands of the *Day Nursery Act* and the agreement between Metro Toronto and the Creche restricted the providers' opportunities to

earn other income. The majority found at paragraph 28 that “[t]he fact that the demands of the D. N. Act and the Creche’s contract with Metro impose the need for most of the controls which the Creche exercises over the providers does not alter the fact that their economic independence and their opportunity to act as independent entrepreneurs are severely circumscribed”. Counsel for the union suggested that this statement indicates that the Board does not care *why* the individual is in a position of economic dependency. In *Creche*, he argued, the demands of the job created the dependency (for example, the providers were limited in the number of children they could care for at one time and were discouraged by the Creche from seeking children under private arrangement). It is our view that the statement in *Creche* refers to the dependency arising out of the conditions of work and therefore is not inconsistent with the proposition in *The Citizen*. The phrase “on such terms and conditions” in section 1(1)(h) (emphasis added) supports the position that the terms and conditions must arise out of the relationship or contract itself. This interpretation is even clearer when contrasted with the phrase “under such terms and conditions” which seems to refer to actual conditions. Nevertheless, the policy underlying the statutory amendment - recognition of the need to look at the reality of the contractor’s relationship with the person with whom he or she contracts - militates against too technical or literal an interpretation of the definition. Rather the statutory purpose encourages us to base our decision on the actual extent to which the contractor is dependent.

14. On this view, some considerable assistance in resolving this issue can be gained from a more extensive consideration of the evidence, seen particularly in light of the extent to which Unger and Sarginson engage in entrepreneurial activity. Unger testified that prior to entering into partnership with Sarginson, he had worked for Fred Palmer, a contractor for Hydro. When Fred Palmer decided to go into a different business, Unger went to see Roger Bouchard, Area Forestry Foreman at Hydro and determined that “[i]f we had the correct insurance and equipment that we’d be able to bid on the contracts because we were doing the work”. Unger and Sarginson then formed a partnership in April 1984 and purchased only the equipment Bouchard advised they would need to work for Hydro. The equipment does not appear to have required any substantial capital investment; it consisted of “two chain saws, one set of spurs, ropes, pulleys, hard hats, chain saw pants [and] boots”. (Unger subsequently purchased a “chipper” himself but neither counsel made much of this additional purchase and it does not change our conclusion that the equipment purchased was for the specific purpose of working for Hydro.) They purchased liability insurance in the amount of \$1,000,000, an amount required and designated by Hydro. They then bid on their first contract and from April 1984 until at least March 29, 1985, they contracted exclusively for Hydro. As they finished one contract, they bid on another. They were awarded 40% of the contracts they bid on but even with a rejection rate of 60%, they were never without a contract with Hydro. They might take a few days off between contracts. For example, they bid on the February 18th to March 29th contract on February 15th and were awarded it that day. Although the contract began on February 18th, they did not commence the actual work until early in March. However, they did not attempt to perform work for anyone else during those periods. Indeed, they were glad to have a few days off.

15. Thus the evidence indicates that Unger and Sarginson began their partnership with the purpose of working for Hydro and did in fact work entirely for Hydro during the operative time. At no time during that period did they exhibit any of the characteristics of entrepreneurial behaviour such as advertising, soliciting work, distributing business cards or other similar activity. Counsel for Hydro claimed that the partnership had the “external trappings of running a business” because they hired an accountant and employees (the issue of employees is dealt with below) and claimed depreciation on their equipment. But there is no evidence to suggest that they would have any other work to go to should they stop working for Hydro. Indeed, the evidence indicates that their sole business contact was with Hydro. We adopt the reasoning of the majority in *Indusmin*

Limited, supra, at paragraph 16: “the decision by a driver to attach his financial success to one entrepreneur [may not be] conclusive of a finding of dependency”, but “the absence of any indication by the driver to expand the parameters of his alleged business may very well justify the inference of dependency”. Unger and Sarginson are similar to the driver in *Indusmin* who was “shown to be patently without business initiative. He does not advertise his services or seek ‘the business’ of other quarry operators. In short, he does not attempt to compete for other customers in order to achieve ‘a better deal’ than that offered by Indusmin Limited”. It can be said of Unger and Sarginson, as it was said of the owner-drivers in *Superior Sand, Gravel & Supplies Ltd., supra*, that “like employees, [they] did not themselves create their own work opportunities but, rather, relied upon the work opportunities created by another person, in this case the respondent ... Work opportunities ... flowed from the respondent”. In that case, the drivers were found to be dependent contractors although they dealt with customers and performed some work for other persons than the respondent. However, unlike Unger and Sarginson, they were expected to notify the respondent if they were going to be absent and they were required to report every morning.

16. All of Unger and Sarginson’s work is done for Hydro. Furthermore, they exhibit no entrepreneurial characteristics. We therefore conclude that the first criterion under section 1(1)(h) of the Act has been satisfied and that Unger and Sarginson are economically dependent on Hydro.

Nature of the Duties owed Hydro

17. Unger and Sarginson cut down trees which Hydro had marked for removal. They could work when they liked, as long as they completed the contract on time. They were not required to report absences to Hydro, but they were only likely to be absent on rainy or snowy days. In fact, they put in the kind of working day one would expect of an employee: weekdays from 7 a.m. to 4:30 p.m. with an hour for lunch and two fifteen-minute breaks. Every three or four days Ron McGibbon came onto the site and spent fifteen minutes confirming that the job was being done properly and that they were wearing their safety equipment. By contrast, regular foresters were expected to report to their foreman every morning. But foresters were not necessarily under constant supervision as the following responses by Ron McGibbon to questions asked by counsel for the respondent indicate:

Q. Tell me about the degree of supervision that a forester would have?

In quite a few instances, there would be no direct supervision with the crew foreman. In Hydro we’re leaning more to two man crews, in a two man situation they don’t deem it necessary to have a supervisory position in that instance, since they’re both trained personnel.

Q. Would the work be assigned on a daily basis?

No not really, it would be assigned a switch number, for example which might represent anywhere from three to five kilometers of line or something of this nature and you just go to that location and do the total line clearing job required.

Q. Would you, during the course of a day, see a crew foreman everyday?

Not necessarily on the job, no, you’d see him in the morning at the shop and that’s about all sometimes.

Q. Would it be a practice that you would see him at least once a day whether it be in the field or the shop?

Oh you’d definitely see him once a day at the shop, yes.

18. While there was little supervision of Unger and Sarginson on a daily basis, Hydro had provided explicit instructions on how the trees were to be removed. Instructions included a diagram showing how the rope and other equipment were to be attached to the tree. There were also written instructions. The method of rigging and chaining trees were set out explicitly and in detail. Prior to beginning the first contract, they received two days of training by Hydro (Unger's training at least had been completed while he had been working for Fred Palmer; the evidence did not indicate when Sarginson received his training) and subsequently four-and-a-half hours of training. They were not paid but attendance was effectively mandatory since a failure to attend would result in no contracts. In felling the trees, they simply started at a point and followed the line of trees. They would not cut down rotten trees or trees in the wires but would notify Ron McGibbon when he came onto the site and he would arrange for their removal. We find that Unger and Sarginson had little discretion in satisfying the requirements of the job.

19. Hydro could unilaterally terminate a contract if a tree was felled on the power line. However, discipline would not be imposed until the third contract, a situation counsel for the union analogized to progressive discipline. Counsel for the union argued that this arrangement was premised on the assumption that there would be successive contracts. Counsel for Hydro submitted that the right to terminate the contract under such circumstances was simply the reasonable right of an owner of property. Hydro could also terminate if Unger and Sarginson did not wear their safety equipment. Counsel for Hydro stated that these requirements were in part to satisfy the minimum requirements of the *Occupational Health and Safety Act*. Neither party elaborated on the application of the *Occupational Health and Safety Act*, nor did counsel for the union dispute the statement of counsel for Hydro in this regard. The relevant provisions of the *Occupational Health and Safety Act* are not determinative of the status of the disputed individuals, since they are consistent with their being either independent contractors or dependent contractors.

20. Unger and Sarginson were paid halfway through a contract and again at the end. Hydro paid no benefits, nor made any deductions. Counsel for the union candidly admitted that this factor was more consistent with the way in which an independent contractor would be paid than with the way in which an employee would be paid. However, we note that this method of payment is commonplace in relationships determined to be dependent contractor-employer relationships (for example, see *Sherman Sand and Gravel Ltd.*, *supra*, and *Nelson Crushed Stone*, *supra*).

21. Counsel for Hydro explained that the work being done here was part of a cyclical process in which certain problems were being remedied. Unger and Sarginson were engaged in a series of short-term contracts for a period of short duration. Hydro did not intend to make Unger and Sarginson an operating unit of Hydro. In fact, Hydro was careful not to integrate them; for example, they were not trained with Hydro employees, there were no Hydro markings on their vehicle or equipment. Yet we note that Unger testified that he had been a contractor with Hydro for a year and a half. The work Unger and Sarginson did was integrated into Hydro's own operation. For example, when a tree was too rotten to cut, they simply informed Ron McGibbon who arranged for someone else to cut it. Furthermore, Unger and Sarginson perform work which is performed by Hydro's own employees (although it constitutes only a portion of the latter's work as foresters).

22. The final issue to be considered is the evidence that Unger and Sarginson hired employees. In *Superior Sand, Gravel & Supplies Ltd*, *supra*, the Board stated that "[t]he employment of others ... is sufficient to place a person beyond the reach of the dependent contractor provisions of the Act". As is pointed out in *Canada Crushed Stone*, *supra*, a conflict of interest could result if both the dependent contractors and their employees could join the same union. But the Board emphasized that only "employers in substance as well as form" should be excluded from coverage

as dependent contractors: “A dependent contractor with the authority to hire, fire, discipline, and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections of the *Labour Relations Act*”. In the instant case, Unger and Sarginson’s employee is hired and terminated by them; his wages are set by them. But Hydro trains the employee and imposes the safety requirements on him that it imposes on Unger and Sarginson. We must look elsewhere for assistance in determining the significance of this factor. Counsel for the union submitted that these employees were hired simply to help lighten the load on a short-term basis. He referred the Board to *Dominion Dairies, supra*, in which the Board distinguished between helpers and employees doing separate work:

When the Board is faced with the question of the effect of the use of paid help by a contractor it must determine whether, in the light of all of the evidence, the person or persons used merely assist the contractor in the performance of his work or in fact perform work that is separate and beyond the work done by the contractor, so that the contractor may fairly be characterized as master of a business that profits in a substantial way from the labour of others.

Thus drivers who hired helpers, as contrasted with truck owners who hired a driver, were found to be dependent contractors. In *Windsor Airline Limousine Services Limited*, [1981] 3 Can LRBR 60, the majority found that an owner-operator of a car who hired a driver is not brought outside the Act because he hired the helper “not as a means of expanding a personal business”, but rather from financial necessity. Unger and Sarginson did not profit from hiring an employee (the employee did not work on a separate contract for them, for example). Hiring employees (one employee during the February 18 - March 29 contract) simply eased the tree-cutting operations in the winter. We note, too, that the employee was trained by Hydro and subject to some Hydro supervision.

23. Thus in their work habits, in the monitoring relationship with Hydro and in their place in Hydro’s work scheme, Unger and Sarginson were more like employees than independent contractors. We believe the safety requirements imposed by Hydro are not determinative on either side of the question. Nor does the fact that they hired employees exclude them from the protection of the Act. Accordingly, we conclude that Unger and Sarginson satisfy the second criterion of section 1(1)(h) of the Act in that their obligation to perform duties more closely resembles an employee than an independent contractor.

24. Counsel for Hydro submitted that the case was moot since the contract at issue had been completed and that the only remedy the Board could give would be a declaration. Counsel for the union confirmed that the union was seeking only a declaration. This remedy is the one envisioned by section 106(2) which does not appear to give the Board discretion to decline to hear and rule on such an application because the question may be moot by the date of the hearing.

25. The Board therefore declares that Dwayne Unger and David Sarginson are dependent contractors pursuant to section 1(1)(h) of the *Labour Relations Act* and that Ontario Hydro (Bancroft Area) is their employer.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. At the outset I should stress that, unlike the majority, in *Cradleship Creche* it was not my view of the evidence that providers were “severely circumscribed” in their opportunity to act as individual entrepreneurs. Moreover, whatever it is that *Cradleship Creche* stands for, I am inclined to agree with the majority in this case that there is little to be gained from attempting to decide whether tree cutters compare more closely with babysitters than with the strippers of *Algonquin Tavern*.

2. Hydro engages in substantial tree-clearing activity in association with the opening of new power lines. The work in question is distinct from the major tree-clearing activity. Inspectors identify new growth which would endanger existing lines if not removed. Having marked the trees in question, the work of clearing it is then contracted out. The Unger/Sarginson partnership is one of the business entities which bid for this work.

3. It is at point to recall that prior to 1984 Unger and Sarginson were among persons employed by Fred Palmer, a contractor through whom this identical work was performed for Hydro. Palmer did not work as a cutter himself and when he decided to get out, Unger and Sarginson found they were well positioned to step into Palmer's shoes in terms of bidding for the work.

4. There seems to be little question that Palmer was an independent contractor since his only involvement was to bid the jobs and hire the men. The apparent change since 1984 is the disappearance of Palmer as a middle-man. This strikes me as a tenuous premise for the insinuation of collective bargaining into the relationship, but it demonstrates the authority of the Board to make such a decision.

2445-84-OH Ken Evraire, Complainant, v. The Corporation of the City of Ottawa, Respondent

Health and Safety - Refusal to operate "weed-eater" - Inspector's order misunderstood - Continued refusal to work resulting in discharge - Whether test for refusal subjective or objective - Comfort not ground for refusing to work - Whether discharge appropriate penalty where employee relies on advice of health and safety representative but has prior disciplinary record

BEFORE: *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. A. Ronson* and *W. F. Rutherford*.

APPEARANCES: *David Jewett*, *C. Dungey*, *W. J. McCorkell*, *Carole E. Rogers*, *K. Evraire* and *Kenneth Geis* for the complainant; *J. Jerold Bellomo* and *David Curry* for the respondent.

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; June 13, 1986

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*. It arises out of the termination on August 20, 1984, of the complainant, Ken Evraire, by the respondent City of Ottawa, pursuant to the following letter:

Dear Sir:

In view of your repeated refusals, since 1984 August 15, to respond to direct, lawful orders from your supervisor resulting in gross insubordination, as well as your past and continuing record of insubordination and other situations resulting in discipline, your employment with the City of Ottawa is terminated effective immediately.

Kindly ensure that any safety apparel or tools etc. which have been issued to you by the City are returned to your supervisor.

Yours truly,

C. Sim

Commissioner of

Physical Environment.

Section 24 provides:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such sections, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

2. The complainant is 45 years old and has Grade 10 education. His work history includes driving truck, playing professional baseball, and doing maintenance-type work for Air Canada and City Tree Experts. In 1975, he began his employment with the City, specifically in the area of Grounds and Trees. The evidence of witnesses called by *both* sides leaves the Board with no doubt that the complainant is an individual who has had difficulty getting along with both his superiors and his fellow workers. The complainant is a large man physically, and it appears to be not uncharacteristic of him to some extent to "bully" other employees in the bargaining unit. He has typically demonstrated a confrontational attitude towards his supervisors as well. Because of his difficulty in

getting along, he appears to have been moved from department to department, and in each case, we gather from one of the complainant's witnesses, his reputation has preceded him.

3. In the Parks department to which he was last transferred before his termination, he appears in general to have continued to be a thorn in his supervisor's side, always insisting that the pieces of operating equipment (to which a specific rate under the collective agreement attaches) be assigned each day on a strict seniority basis. As another of the complainant's witnesses put it, the employees in general recognized that there had to be a bit of give-and-take in the day-to-day assignment of equipment, but when the complainant was there, "he always made sure he got the highest-rated piece of equipment". As well, the complainant appears to have been a thorn in more than supervision's side in his final area of assignment: management was presented a petition signed by a number of employees in the department, indicating that they did not wish to work with the complainant.

4. On June 13, 1984, the complainant was operating a sling-carried machine called a "weed-eater". The weed-eater has a muffler at the back which protrudes 5 or 6 inches behind the operator. City policy has always been that employees wear long-sleeved shirts when operating such equipment, but the shirt being worn by the complainant that day was ragged and floppy, thus exposing his forearm. The complainant had not been fully trained on the operation of the weed-eater, and was having difficulty shutting it off. In reaching back to try to locate the switch, the complainant burned his forearm on the hot muffler. This produced a welt about the size of a 50-cent piece, and the complainant received medical treatment.

5. The next month, on July 26th, the complainant was again assigned to operate one of the "weed-eaters". He refused on grounds of health and safety. The Ministry of Labour was called pursuant to section 23 of the *Occupational Health and Safety Act*, and an inspector, Mr. Simpson, came to examine the equipment. In all, Mr. Simpson spent some 3 to 3-1/2 hours at the City's yard that day, reviewing the situation with supervision, the complainant, and the workers' health and safety representative, Mr. Hayward. According to the complainant and Mr. Hayward, Mr. Simpson, in the course of his examination, voiced the opinion that the muffler on the weed-eater did become excessively hot in operation, and that some means should be found to guard it before the machine was operated again. In his written order, however, he quoted from section 88 of the Regulations under the *Health and Safety Act*, giving the employer two options, as follows:

"Order to Employer.

Where a worker is exposed to the hazard of injury from contact of his skin with,

(c) a hot object

he shall be protected by

(e) wearing apparel sufficient to protect him from injury, *or*

(f) a shield or similar barrier.

[emphasis added]

And added:

- (1) Green machine - Weed eater Model 3000 S/S has a muffler and shroud combination which presents a hazard of burning of the skin."

6. The City's response to the directive that Mr. Simpson issued, as set out above, was to

order protective welder's sleeves which would cover the full arm of any employee called upon to operate the weed-eater. This was not a response which the complainant and Mr. Hayward felt complied with the order, as they, relying on what they thought were Mr. Simpson's oral comments, had understood it.

7. The complainant was not again requested to operate a weed-eater until August 7, 1984. On the morning of August 7th, the complainant had been assigned to operate a Kut-Kwik mower in a basin-like field. The complainant indicated he had had problems with the fumes from that machine before, and was particularly concerned with operating it in the terrain assigned that day. The Ministry of Labour was called, and an inspector, Mr. Cunningham, came to the yard to review the situation. After Dreiger tests were performed on the emissions, Mr. Cunningham ruled that no undue hazard existed.

8. That afternoon the complainant was asked to again operate one of the weed-eaters. He again refused on the ground of health and safety, and the Ministry was called. And once again it was Mr. Cunningham who came to investigate. Mr. Cunningham's initial reaction to the hot muffler was that it was unsafe and needed a guard. After management demonstrated how the work-gloves, protective welder's sleeve, and overalls covered any exposed area, however, Mr. Cunningham ruled that it was management's option which way they wanted to protect the workers from the muffler hazard. That option, in essence identical to the written order of the previous inspector, Mr. Simpson, was set out in a formal report issued on August 9th. The complainant and Mr. Hayward, the health and safety representative, had disagreed with Mr. Cunningham's conclusion on August 7th, and the complainant indicated that he would appeal it. Mr. Cunningham had simply replied that that was the complainant's prerogative.

9. The City, for its part, continued throughout the day on August 7th to try to allay the concerns expressed by the complainant. The complainant's foreman, Mr. Ladouceur, had asked the complainant previously to put the welder's sleeve on and receive training on the weed-eater, but the complainant indicated that the sleeve was uncomfortable and restricted the movement of his arm, and that he was not prepared to touch the machine unless it had a proper guard. The complainant was subsequently invited to discuss the matter with two of Mr. Ladouceur's superiors, Mr. Carling and Mr. Smith, and Mr. Smith asked the complainant what personal protective equipment the City could provide to get him to operate the machine. The complainant replied, "none". Mr. Smith responded that if the complainant went on refusing to operate every piece of equipment in the yard, he would eventually run out of work. To that the complainant retorted that "he would tie [Mr. Smith] up with Bill 70 so badly that he wouldn't be able to move". The complainant was assigned to other work for the remainder of August 7th.

10. The complainant was absent from work for a few days after August 7th, and was not again asked to use a weed-eater until August 15th. On that day, *all* the employees in Mr. Ladouceur's crew were asked to take out weed-eaters. This was an unusual occurrence, and one of the complainant's witnesses, Karen Wood, testified that the "consensus" amongst the employees was that management was trying to set the complainant up. There was a good deal of grumbling going on amongst the employees, because it meant that all of them would be paid at the lower rate attaching to the weed-eater. Ms. Wood concedes, however, that Mr. Ladouceur did at one point explain the reason for the assignment, and the Board accepts those reasons as *bona fide*. There had been complaints about the roadsides needing cutting, and Mr. Ladouceur knew that he was a couple of weeks away from losing his summer-employment complement. There was only one type of mobile tractor, the Bobcat, suitable for cutting roadsides safely, and all of the Bobcats were in the garage to have safety meshes installed over their engines (a summer student had narrowly escaped injury when a piece of his clothing became entangled in the engine apparatus). Notwithstanding

her obvious sympathy for the complainant, Ms. Wood also acknowledged that she operated the weed-eater on a regular basis (even without the welders' sleeve) and never felt any concern for her safety. She further acknowledged that by August 15th all employees had been provided with welding sleeves, and had been instructed by Mr. Ladouceur to wear them when operating the weed-eater. It might be noted that Mr. Ladouceur is a member of the bargaining unit as well.

11. The complainant alone refused to operate the weed-eater. Further attempts by senior management to persuade him were of no avail. The complainant insisted there were other jobs that he could be assigned to, and the management officials explained why there were not. Once again a call was put in to the Ministry of Labour. The Ministry official who answered the telephone was familiar with the earlier refusals, however, and responded: "Not that bastard Evraire again". The Ministry official then went on to say that the situation with the weed-eater had been investigated twice, and that the Ministry would not be sending an inspector out to go through it all again. With the Ministry not prepared to play any further role in the matter, both sides had to make their own assessment of where they stood. Mr. Ladouceur (and senior management subsequently) made it clear to the complainant that the weed-eater was the job they had for him, and if he did not wish to do it, he would not be paid. The complainant asked Mr. Ladouceur if that meant that he was being suspended or sent home, and Mr. Ladouceur responded, "No". At the same time, however, management made it clear to the complainant that, in light of the Ministry's conclusions, they felt he no longer had a right to refuse the work assigned.

12. Throughout all of this, the complainant was receiving advice from the health and safety representative, Mr. Hayward. Mr. Hayward had taken a 30-hour course sponsored by the Ontario Federation of Labour, and had been schooled in the Federation's Occupational Health and Safety Manual. On the right to refuse work, the Manual provided in part:

It is now clear that the right to refuse work continues even after an inspector has concluded that the work is not dangerous. The Act simply requires the workers to have reasonable grounds to believe the work is hazardous. Thus, in a situation where a worker *has reason to believe* the inspector is wrong, the right to refuse continues.

[emphasis added]

Mr. Hayward focussed on the second half of that passage, and gave the complainant the advice that he could continue to refuse the work so long as he felt it was unsafe. Mr. Hayward also advised the complainant that it was the employer's obligation to continue to provide alternate work.

13. The complainant as well sought advice by telephone after the developments of August 15th from Mr. William McCorkell, who was also an employee health and safety representative with the City, and who had accompanied Mr. Hayward on the complainant's August 7th refusals. Mr. McCorkell in fact had been Mr. Hayward's instructor at the O.F. of L. course. Mr. McCorkell *did* know the proper test for a worker being entitled to refuse to work after an inspector had declared the work safe, that being on the objective basis of "reasonable grounds" (as discussed *infra*). Mr. McCorkell never did, however, explain to the complainant that that was the test, because Mr. McCorkell was of the view that the complainant *had* reasonable grounds. Unfortunately, that view was based not only on the fact that the complainant had burned himself once on the machine, but also on the complainant and Mr. Hayward's representation to Mr. McCorkell that the *first* inspector, Mr. Simpson, had agreed with the complainant, and had ordered that a guard be provided on the muffler. That representation was based on the complainant and Mr. Hayward's understanding of that order, flowing from Mr. Simpson's oral comments, and, as noted earlier, that understanding was in fact erroneous. (Mr. McCorkell did not himself see the order of Mr. Simpson until sev-

eral months after the events in this complaint.) It is not clear on what date the complainant spoke to Mr. McCorkell, but it was some time between August 15th and August 20th. Mr. McCorkell simply advised the complainant that he could continue to refuse to operate the weed-eater, and that he should start getting his appeal down on paper.

14. On August 16th the Bobcat mowers still were unavailable from the garage, and Mr. Ladouceur once again assigned everyone to the weed-eaters. Once again only the complainant refused, and was ultimately ordered off the property, as he was refusing to perform the only work available, and was causing a disruption amongst the other employees. The complainant then set about to obtain further advice on how to launch an appeal of the inspector's order of August 9th. It appears that the complainant did not get along with certain business representatives of his union any better than he did with some of his fellow employees and management, and he had difficulty getting instructions with respect to the appeal. He did, however, finally end up that day at the union office, where a business representative, not familiar with the situation, Akivah Starkman, did his best to give the complainant advice. The City in the past had always provided the complainant with alternate work in the case of a refusal, and Mr. Hayward and the complainant had been insisting that that obligation continued after the August 9th order. Mr. Starkman telephoned the Ministry of Labour in Ottawa and was advised that in the face of the inspector's decision, management was within its rights to send the employee home without pay, whether or not an appeal was pending. The Ministry explained that the Director of Health and Safety would not on the appeal determine the question of entitlement to back pay, but only the question whether the equipment was "likely to endanger". The former question, it was stated, was a matter for the Labour Board, and it was suggested that the complainant write a letter to the Labour Board immediately, without waiting for the Director to hear his appeal. Mr. Starkman passed all of this on to the complainant. The complainant then asked Mr. Starkman what he should do about reporting for work, and Mr. Starkman advised that since he had not been formally suspended, he ought to continue to report for work, so that it could not be said that he had quit. As for operating the weed-eater itself, Mr. Starkman indicated to the complainant that he could offer no opinion as to whether the machine was safe or not, not being familiar with it, and that it was up to the complainant to decide whether to operate it or not. The complainant continued to be of the view that there *was* other work to which he could be assigned, and that management was simply punishing him for refusing the assignment of the weed-eater. Mr. Starkman accordingly helped him prepare a grievance stating that in his view he was being unjustly suspended and disciplined.

15. Meanwhile, management too was trying to decide what ought to be done with the complainant. And when the complainant on Friday, August 17th once again refused to operate the weed-eater, the decision was made internally to fire him. A letter was prepared, and a copy sent to the union. When the matter was discussed with the City's Personnel Department, however, it was recommended that no action be taken until the complainant had had an opportunity for an interview with union representation. The complainant's copy of the discharge letter had not yet been sent to him, and the union was advised to disregard the copy it had received. It would appear that the union did just that, to the extent of not even discussing with the complainant the fact that they had received it.

16. At this point the City's Director of Operations, David Curry, returned from vacation, and was apprised of the action being contemplated. Mr. Curry took the complainant's file home with him over the weekend, and reviewed it in detail. Mr. Curry then arranged for a meeting to take place in his office on Monday, August 20th, at 9 a. m., in the event the complainant once again refused the assignment of the weed-eater.

17. Once again the complainant was asked on the Monday to operate the weed-eater, and

once again he refused. He was then told to report to Mr. Curry's office at 9 o'clock. Mr. Hayward, the health and safety representative, was advised to attend also, as discipline might be involved. Mr. Hayward accordingly contacted the complainant, and told him he would meet him outside Mr. Curry's office a few minutes before nine. At the meeting, Mr. Hayward did most of the talking for the complainant. Mr. Curry asked the complainant if he was going to operate the weed-eater, and the complainant said "no". Mr. Hayward stated that the complainant was entitled to refuse that work under the Act, and that the City was obligated to give him alternate work or other directions. The City officials then went out, and when they returned, handed the complainant the letter of termination, in the same form as had been withdrawn on Friday. Mr. Hayward said that he and the complainant would review the letter, and they left. It was Mr. Curry's evidence that he had not been made aware of the fact that the complainant was challenging the decision of the inspector. He also testified that he had been assured by his subordinates that there was no alternate work available to the complainant on August 20th, and that if there had been, his instructions would have been that the complainant be assigned to it.

18. The complainant apparently filed a section 24 complaint with the Board in September, and withdrew it in October pending his appeal with the Director. No mention was made of that appeal at the termination meeting of August 20th, and Mr. Curry was not aware of it until the Ministry called him about it in November. The letter setting out the complainant's appeal was itself received by the Director on September 5th. The complainant testified that he in fact mailed his appeal to the Director on August 17th. In our view, nothing turns on that point other than the complainant's own credibility, but on all of the evidence, we find it improbable that the complainant's statement represents the truth. Rather, we find this to be an instance, and not the only one, where the complainant appeared to us inclined to stray from the truth, in an effort to obtain his job back. If the Board should find any relief for the complainant to be appropriate, it will not be because we were impressed with his candour, and where the complainant's and the City's evidence has conflicted, we have preferred the evidence of the City.

19. The complainant's appeal, when it was filed, in fact covered both the Kwik-Kut machine and the weed-eater. Two days of hearings were held before the Director of Appeals in March of 1985, and in lengthy written decisions issued in April, the Director upheld the conclusions of Mr. Cunningham that neither machine was "likely to endanger the health or safety of a worker".

20. Notwithstanding those decisions, the complainant continues to insist that the only proper way to guard the weed-eater is at the source of the danger, the muffler. He indicates, as he did on his appeal, that his concern was and is that the welder's sleeve still leaves exposed other parts of his body, that he could fall or lose consciousness and come in contact with the hot muffler, or that he could burn another employee working in close proximity to him. The complainant indicates that he would, however, now operate the weed-eater, using extreme caution, should he be given that opportunity.

21. Section 23 of the *Occupational Health and Safety Act* provides in its material parts:

- 23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,
- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
 - (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
 - (c) any equipment, machine, device or thing he is to use or operate or the

physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the workers shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision in writing, as soon as is practicable, to the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use

or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

As can be seen, the basis upon which an employee is entitled under the Act to refuse to perform an assigned task is initially that the employee have "reason to believe" the work is unsafe. Those words, as the jurisprudence has long made clear, establish a test that is *subjective* in nature. See, for example, *Beachvilime Ltd.*, 16 L.A.C. (3d) 22 (Palmer), at page 29. After management has taken steps to investigate or remedy the situation, however, the requirement for continued refusal becomes "reasonable grounds". It is now accepted that the term "reasonable grounds" establishes an *objective* test, in the same way as the term "reasonable cause" did under the predecessor legislation. And in *Inco Metals Co.*, [1980] OLRB Rep. July 981, the Board had this to say about the latter phrase:

59. The requirement that an employee have "reasonable cause to believe" that there is danger imposes an objective standard by which to test the employee's action. The Act does not, by the use of the words "reasonable cause", legislate different standards of protection for the squeamish and the intrepid. Different employees within the same work place may have different views of what constitutes an acceptable risk. Likewise, strangers to a particular trade industry might view with alarm situations that are not seen as hazardous by the people who work in that field on an every day basis. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

As can also be seen, section 23 cuts off at the point where the inspector renders his decision. It is accepted, however, that an employee can continue beyond that point to refuse to perform work he feels is unsafe, provided he still has "reasonable grounds" for doing so. And in that regard, the further observations of the Board in *Inco Metals Co.* are important:

73. ... As the procedures under *The Employees' Health and Safety Act* unfold in a given incident, there may be a growing onus on employees to establish that they had reasonable cause to fear for their safety.

More specifically, with respect to the finding of a Ministry inspector that the work is safe, the Board wrote in *Auto Jobbers Warehouse Ltd.*, [1981] OLRB Rep. Dec. 1715:

13. ... Generally, one would expect that the report of an inspector would settle a matter such as this. If the report of an inspector indicates that certain equipment is unsafe to operate, then one would assume that the employee would be entitled under the Act to continue to refuse to operate it until the problems noted by the inspector had been corrected. On the other hand, should the inspector, after an investigation, conclude that the equipment is safe to operate, then it will be much more difficult for an employee to claim that he or she still had a reasonable belief that it would be unsafe to do so. As the Board noted in the *Canadian Gypsum Construction* case [1978] OLRB Rep. Oct. 897, an employee who refused to work in the face of an investigation and a decision by a neutral expert that the work is safe, "must meet the substantial onus of establishing that he has reasonable cause to believe otherwise and is entitled to the protection of the Act".

22. What is the effect of an appeal of the inspector's decision, and the result thereof? To begin with, the mere filing of an appeal changes nothing. The employee still must have "reasonable grounds" to refuse to work, and if relief is sought by any party from the impact of an order of

an inspector, the Act makes provision for the possible suspension of the order by the Director, pending the appeal. Section 32 provides:

- 32.-(1) Any employer, constructor, owner, worker or trade union which considers himself or itself aggrieved by any order made by an inspector under this Act or the regulations may, within fourteen days of the making thereof, appeal to a Director who shall hear and dispose of the appeal as promptly as is practicable.
- (2) An appeal to a Director may be made in writing or orally or by telephone, but the Director may require the grounds for appeal to be specified in writing before the appeal is heard.
- (3) The appellant, the inspector from whom the appeal is taken and such other persons as a Director may specify are parties to an appeal under this section.
- (4) On an appeal under this section, a Director may substitute his findings for those of the inspector who made the order appealed from and may rescind or affirm the order or make a new order in substitution therefor, and for such purpose has all the powers of an inspector and the order of the Director shall stand in the place of and have the like effect under this Act and the regulations as the order of the inspector.
- (5) In this section, an order of an inspector under this Act or the regulations includes any order or decision made or given or the imposition of any terms or conditions therein by an inspector under the authority of this Act or the regulations or the refusal to make an order or decision by an inspector.
- (6) A decision of the Director under this section is final.
- (7) On an appeal under subsection (1), a Director may suspend the operation of the order appealed from pending the disposition of the appeal.
- (8) This section does not apply to the order of a Director made under section 20.

The Director was not asked to exercise such power in the present case. As can be seen from section 23, the role of the inspector is to decide “whether the machine, device, thing or the work place or part thereof is likely to endanger” the worker or another person. On appeal, the Director is asked to decide whether the inspector was right or wrong. The issue before the Director, therefore, is the same: was the machine, device, or thing or the work place or part thereof likely to endanger the worker or another person. He is not asked, and he does not decide, whether the employee did or did not have “reasonable grounds” to be concerned at the time. As the Board noted in *Inco Metals Co.*:

60. The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work.

See also *Firestone Canada Inc.*, [1985] OLRB Rep. July 1044. As a practical matter, however, the comments of a senior-level neutral expert, when they are confined to the evidence available at the time of the refusal, and are issued after a full hearing into the matter, may obviously provide some guidance to the parties in assessing the reasonableness of each other's position. We do not, on the facts of this case however, find it necessary to consider the effect of the decision of the Director of Appeals any further.

23. What *are* the facts of the case before us? The weed-eater was not a new piece of equipment; it had been operated by the employees in the Parks department on a routine basis without

complaint. Even after the complainant began to make an issue over it, no other employee familiar with it expressed any concern over its use. In that regard we note again the testimony of Karen Wood, a witness otherwise clearly sympathetic to the complainant. Two inspectors were called in to review the matter, and were satisfied that the sleeve and other equipment supplied by the City provided reasonable and adequate protection for the operators.

24. On what basis did the complainant continue to refuse? Primarily, he had been burned once, and was not prepared to operate the machine until the source of the heat was guarded directly. But the burn to the complainant occurred not only in the absence of the welder's sleeve, but in the absence of long sleeves on his shirt which would properly cover his forearm, as required by the City's dress code, of which all employees were aware. The complainant's unfamiliarity with the weed-eater appears to have been a factor in his accident as well; yet he steadfastly refused the training offered by Mr. Ladouceur from July 25th onward. The complainant refused to wear the sleeve even for such training purposes, although his only real complaint about the sleeve was that it was uncomfortable. "Comfort", as used here, does not appear to us to be a basis for invoking the refusal-to-work provisions of the Act. Nor can the complainant rely on his own misreading of the first of the inspector's reports to establish "reasonable grounds". The test is, as noted, an objective one, and the order of Mr. Simpson clearly gave the City the option of providing a guard on the muffler, *or* adequate safety apparel.

25. Finally, the complainant also mentioned his concern that he might burn others, or he might become unconscious and fall on the machine with an unprotected part of his body. The complainant was unable to be specific about any of this having happened in the past, and the evidence is that employees using the weed-eater are not required to work in close proximity to one another.

26. On the evidence established before us, we are all of the view that the complainant did not have reasonable grounds to continue to refuse to operate the weed-eater, at the very least by the time the second inspector's report was released on August 9th. Rather, we find that the complainant's refusal was based on an unjustified rejection of the safety apparel properly provided by the employer, and the fact that he had burned himself by his own improper handling of the machine on a prior occasion. As with so many situations in the work place, it cannot be said that the hot muffler of the weed-eater provided *no* risk of harm, if adequate care and precautions were not taken. But with normal care and the protective equipment that *was* available, we do not find that the complainant had reasonable grounds to believe that the weed-eater was *likely* to endanger himself or another worker. The complainant was not, therefore, acting in compliance with the Act, and was, on August 20th, 1984, subject to discipline.

27. That, however, is not the end of the matter, since section 24(7) of the *Occupational Health and Safety Act* empowers the Board to act in the same capacity as an arbitrator and to consider whether grounds exist to compel modification of the penalty that was imposed. Unlike most cases coming before the Board under the *Occupational Health and Safety Act*, the issue is not simply the employer's right to send the refusing employee home without pay. The employer has already been vindicated in that regard. The issue which must be faced in this case, however, is whether the far more serious penalty of *discharge* is fairly supported by the facts. The complainant, due in large part to his own obstinacy and unsatisfactory record, has now been out of work and without pay for a good many months. Having regard to those same considerations, and in particular the complainant's employment history, we are not of the view that the City, who correctly assessed the lack of any undue risk in the work place, and made every reasonable effort to satisfy the complainant of this (until, as Mr. McCorkell put it, the employer was simply "exhausted"), ought to be asked now to carry any of the burden of that loss of pay. But is the record of the complainant, together with the other circumstances present here, such as to render reinstatement inap-

propriate? Counsel for the complainant implores the Board to find that it is not, and it is this aspect of the case which has given the Board the greatest difficulty.

28. While the complainant clearly has been a difficult employee for the City for what appears to be the bulk of his period of employment, the parties' collective agreement has a form of 30-month cut-off clause, and presumably on the basis of that the City has limited its argument to reliance on disciplinary incidents only from May 27, 1982 forward. On that date the complainant received a five-day suspension, which was reduced jointly by the parties to a two-day suspension. The final paragraphs of the letter which accompanied that suspension, and which remained on the complainant's record, read:

Due to your continuing unsatisfactory behaviour towards your responsibility to provide productive work for the employer, your continuing disregard of supervisors' instructions, your generally abusive attitude towards supervisors and your apparent difficulty in getting along with your fellow workers, I have no alternative but to assess a five day suspension from work without pay for your actions of refusing to work on May 17, 1982. The five day suspension from work without pay will be taken at a time suitable to your supervisor in the near future.

Should you again become involved in a situation of insubordination or unco-operative attitude toward your supervisors or your fellow workers, it will be necessary to seriously consider more severe disciplinary measures including possible termination of your employment with the City of Ottawa.

Since that time, the complainant has been subject to the following minor discipline:

July 29, 1982

- letter concerning allegations of sexual harrassment

February 1, 1983

- letter concerning refusal to work alone as a security guard

July 27, 1983

- letter transferring complainant to Parks after refusal to climb a tree

March 12, 1984

- letter concerning unauthorized absence on vacation.

29. Against that record are the complexities arising in this case over the application of the *Occupational Health and Safety Act*, and the procedures that the Act sets out concerning the right to refuse to perform an assignment of work. That legislation sets out important rights for employees generally, and abuse of the legislation by individual employees will ultimately weaken its effect for all. Were the Board satisfied that the complainant was on August 15th and thereafter simply acting on his own in furtherance of his heated threat to Mr. Smith to "tie him up so badly with Bill 70 that he couldn't move", any thought of mitigation of the complainant's penalty would be out of the question.

30. But the complainant was not acting on his own on this occasion. Rather, he was at all times acting here in conjunction with the technical advice of his two health and safety representatives, Mr. Hayward and Mr. McCorkell. And whatever the attitude of the complainant was toward management, there was nothing in the evidence to suggest a general pattern of defiance on the part of Mr. Hayward or Mr. McCorkell. Yet both men supported the complainant in his refusal to the end. Mr. McCorkell understood the proper test for refusing, but took the word of Mr. Hayward and the complainant as to what the initial order of the inspector Mr. Simpson had said. Both of them were mistaken in what that order said. Mr. Hayward, on the other hand, relied on the O.F.

of L. training manual in telling the complainant that he could go on refusing as long as he had "reason to believe", or that he himself felt, that the machine was unsafe. Mr. Starkman, in trying his best to advise the complainant on August 17th, did not disabuse him from that notion when he told the complainant that he should return to work, but that it was up to him to decide whether or not the particular machine was safe to operate. We find it necessary to note, as well, that the failure of the O.F. of L. manual to distinguish accurately the "reasonable grounds" test from the "reason to believe" test is not inconsistent with some of the early jurisprudence of the Board itself on this subject. (See, e.g. *International Harvester*, [1983] OLRB Rep. June 898, at paragraph 23.) We are compelled to find that all of the uncertainty or misunderstanding of the complainant's legal position under the Act, fostered at least in part by the advice of individuals upon whom it was not unreasonable for the complainant to rely, while in no way altering the fact that management has itself acted properly, does go to lessen the severity of the complainant's insubordination, or the extent to which management's authority was being wilfully undermined, from the point of view of mitigation of the penalty. See, for example, *Collective Agreement Arbitration in Canada*, 2 ed. Palmer, at page 294; *Canadian Labour Arbitration*, Brown & Beatty, at page 484.

31. It is also not without significance that Mr. Starkman made it plain to the complainant on the 17th that management at that point did not have an obligation to provide the complainant with alternate work. The complainant therefore had nothing to gain from his refusal to operate the weed-eater; yet he continued to refuse, it would appear, because of his own unwarranted emphasis on the fact that the machine had burned him once, and his annoyance over the welder's sleeve. None of that, as the Board has indicated, provided "reasonable grounds" for the complainant to refuse, but it does go, once again, to the question whether what was taking place here was simply a wilful abuse of the Act, in order to obtain a more satisfactory work assignment.

32. Although of lesser significance than the foregoing, we also have difficulty concluding that the complainant was clearly on notice on August 20th that any further refusal to operate the weed-eater would mean the end of the complainant's employment with the City. The employer in the past had always provided alternate work to the complainant even where it considered his concerns to be unjustified, and the debate right up to the point of termination continued to focus on whether any such work was available to the complainant on August 20th. The employer had pointedly declined to treat the complainant's refusal to operate the weed-eater as disciplinary prior to that point and, while it is apparent to us from the evidence that management acted with restraint and was genuinely trying to be fair to the complainant, it is less apparent to us that the complainant recognized on August 20th that the choice he was faced with was to operate the weed-eater, or forfeit his employment with the City altogether.

33. Having regard, therefore, to the elements, discussed above, going to lessen the culpability of the complainant's insubordination, together with the lack of a clear signal from the employer that nothing short of dismissal was the alternative, we find that even an employee as unsatisfactory and obdurate as the complainant is entitled to a clearer opportunity to make a "last-chance" judgment about continuing his employment than the circumstances in fact provided in the present case. We accordingly direct that the complainant be reinstated in his employment with the City forthwith, without compensation, but also without loss of seniority or service credit. Whether the complainant can overcome his previous attitude toward management and other employees, so as to enable him to continue his employment with the City, remains to be seen. But he should be aware that his statement to Mr. Smith about "tying him up with Bill 70" will outlive this decision, and no tribunal is likely to have sympathy for any employee whom it finds to be subverting important safety legislation for his own ulterior motives.

34. The complainant's employment future is back in his hands.

DECISION OF BOARD MEMBER J. A. RONSON;

1. This case began by way of an attack by Mr. Ken Evraire ("the complainant") upon the integrity of the City of Ottawa ("the City") in its handling of safety-related labour relations matters. The complainant alleged that the City had terminated his employment as part of a coercive scheme, abetted by local officials of the Ministry of Labour, to thwart the intent and the enforcement of the *Occupational Health & Safety Act*, R.S.O. 1980, c. 321 ("the OHSA").

2. As the case progressed, it became apparent that the complainant would fail completely in his attempts to substantiate his allegations and, conversely, that the City would prove that the allegations were completely without substance. With the entrance of Mr. Jewett as complainant's counsel, what started as an attack on the City's motives turned into an explanation of the complainant's motives. In short, the case turned into a plea for the application of section 24(7) of the OHSA, based on the complainant's ignorance of the law.

3. To date, a plea of ignorance of the OHSA has not been accepted by the Board when it is advanced by an employer. In fact, the employer bears liability for mistakes made by a Ministry inspector when it (the employer) otherwise complies with the OHSA (see *Auto Jobbers Warehouse Ltd.*, [1982] OLRB Rep. May 649).

4. But were the actions of the complainant founded in ignorance? I think not for the following reasons:

- (a) The complainant is a person who does not like to perform certain types of work in his job classification. Specifically, if it involves walking or operating equipment that does not have a seat, then the complainant will not like it.
- (b) The employment record of the complainant reveals a substantial history of application and enforcement of the OHSA by the complainant. Given what later occurred, I discern from his record, a growing knowledge by the complainant that the OHSA could be used to further his own personal objectives.
- (c) Events reached the stage where the complainant began to invoke the OHSA when he was given a task that he disliked. All went according to plan so long as the City was able to move him to a job that was more to his liking.
- (d) Matters came to a head with the circumstances of this complaint. The complainant was by now so comfortable with the OHSA that he advised the City that he could and would use it to suit his purpose. He attempted to do so with respect to the "weed-eater" machine, and for the first time faced the reality that the City had no other equipment for him to operate.
- (e) Encouraged by his safety representatives, the complainant then stubbornly dug himself into a hole from which there was no escape. Given numerous chances to return to work, he refused the opportunities. There should really be no surprise that his employment was terminated.

5. The Board is not dealing with ignorance here, but the conscious intent of the complain-

ant to seek to have the OHSA work according to his dictates. And there is little, if any, remorse shown by the complainant when he finally comes to realize that he is in serious difficulty. His remorse is that the City was correct in its application of the OHSA and his was wrong. There is no doubt that the complainant has not learned anything positive from this experience. If he is returned to work, he will continue to use the OHSA as a weapon in his grievances against the City.

6. I don't think any employer should be forced to re-hire an employee who shows so little respect for the vitally important intent of the OHSA or so little remorse for his wrongful use of its provisions. And when that employee is one who has used the provisions of the OHSA to further his own objectives, then there can be no redeeming quality mitigating in favour of reinstatement. I would dismiss the complaint.

0784-86-U; 0808-86-U Ontario Nurses Association, Applicant, v. Ottawa Civic Hospital, Respondent; **Ottawa Civic Hospital**, Applicant, v. Donna Hicks, President, Local 90 and Ontario Nurses Association, Respondents

Lockout - Strike - Employer eliminating extended shifts to circumvent economic burden resulting from interest arbitration award unless union prepared to waive benefit in award - No loss of hours or pay for employees - No "suspension of work" within meaning of lockout definition - Whether employee responses to shift elimination constituting "strike"

BEFORE: Judge R.S. Abella, Chairman.

APPEARANCES: *Judith McCormack, Donna Hicks, David Nicholson and Felicity Briggs* for the Ontario Nurses Association; *Paula Rusak, R.H. Stansel, T. Williamson and D. Pearlman* for the Ottawa Civic Hospital.

DECISION OF THE BOARD; June 23, 1986

1. The Ontario Nurses Association is seeking a declaration pursuant to Section 93 of the *Labour Relations Act* that the Ottawa Civic Hospital has authorized an unlawful lock-out. The application by the Ottawa Civic Hospital, alleges that the Local president and the Ontario Nurses Association have authorized an unlawful strike and relief is sought pursuant to Section 92 of the *Act*. The proceedings were consolidated on consent of the parties.

2. The 1,289 nurses in the bargaining unit at the Ottawa Civic Hospital have traditionally worked on two kinds of shifts: approximately 750 of the nurses work on 11.25 hour shifts, the balance work on 7.5 hour shifts. During any given 24 hour period, there are either three 7.5 hour shifts or two 11.25 hour shifts. The 11.25 hours shifts are commonly referred to as "extended tours".

3. Ottawa Civic Hospital is part of a centralized bargaining system in which monetary issues are centrally bargained and non-monetary issues are bargained locally. Because the parties were unable to effect a collective agreement during the last round of bargaining, the issues were submitted to a central interest arbitration board chaired by Victor Scott. One of the issues before that board dealt with the amount of holiday pay for nurses on extended tours. Prior to the award, nurses on either shift who worked on statutory holidays received a day off in lieu plus time and a

half based on the rate of the 7.5 hour shift. The Scott award issued on November 1, 1985, held that nurses on extended tours should be paid for statutory holidays on the basis of 11.25 hours.

4. In the current round of negotiations, the Ontario Hospital Association representing 150 participating hospitals, including the Ottawa Civic Hospital, has proposed eliminating the aspect of the Scott award dealing with holiday pay provisions awarded to the extended tour nurses. The issue is now before an interest arbitration board chaired by Gordon Simmons.

5. On May 16, 1986, the Hospital through Kerry Marshall, its Vice-President of Patient Care notified the Ontario Nurses Association that on June 21, 1986 it would be cancelling extended tours to reduce the cost implications of the Scott award. In Marshall's memo dated May 16, 1986 to Ottawa Civic Hospital Nursing Staff, she explained the economic reasons for the Hospital's decision to return to the 7.5 hour work schedule but stated that the Hospital "would be willing to remain on extended tour rotations if [Local 90] would agree to remain at the current payment of 7.5 hours for statutory holiday lieu days". The Local refused this request.

6. The Ontario Nurses Association, in addition to this application, has brought unfair labour practice proceedings before this Board and has filed a grievance. Both of these matters are still pending. In the grievance arbitration before Judge Little, the Association requested but was refused an interim order preserving the status quo pending the outcome of the grievance.

7. In May, the Local called a general meeting of the membership to inform them of what had happened. At this meeting, it was decided that the nurses would wear black ribbons or arm bands and that there would be an information picket. It was also agreed, with the approval of the Association, that the Hospital would be "grey listed", a procedure whereby all health services across Canada were notified of the labour problems at the Hospital and workers were advised not to apply for employment at the Ottawa Civic Hospital except as a last resort.

8. On May 28, Marshall posted another notice to all bargaining unit Registered Nursing Staff. The notice reaffirmed the contents of the May 16, memo and stated:

"May we remind you that the Hospital entered into extended tours over the last ten years on the condition that the efficiency of the area was not to be affected. *In other words, the extended tours were to cost no more than the 7.5 hour tours.* Prior to the Scott award, both 11.25 hour tour nurses and 7.5 hour tour nurses earned up to 82.5 hours of lieu days for stat holidays. The Scott award has increased this to 123.75 hours for nurses on extended tours and the cost of this is estimated at \$300,000 to \$450,000 per year.

We wish to emphasize that *THE HOSPITAL IS PREPARED TO CONTINUE THE EXTENDED TOURS* if they can reach agreement with the Ontario Nurses' Association to get some relief from the Scott award. Specifically, if we can agree that there will be *no more than 82.5 hours of lieu days for stat holidays* for nurses working extended tours, these extended tours will be maintained.

This offer has been put to O.N.A. both in my letter of May 16th and in a meeting on May 26th. If an agreement cannot be reached on this matter, the Hospital will be exercising its right to return to the 7.5 hour tours on June 21, 1986. If you wish to maintain the extended tours please make your feelings known to the Executive of your Local as soon as possible."

9. On June 18, Mr. D. Pearlman, the Hospital's Director of Labour Relations asked Donna Hicks, the President of Local 90 about a rumour he heard relating to the possibility that the nurses would take job action in response to the Hospital's rescheduling. Ms. Hicks said that some job action was being considered but that she would let him know. On June 19, Hicks again spoke to Pearlman, advising him that there was to be a general meeting that night and that she would inform him if any action was to be taken by the nurses. At the general membership meeting that

night, the nurses agreed that they would claim their benefits under the contract. Hicks gave evidence that this involves no reduction of work but means rather that the nurses were urged to apply for what they were entitled to, rather than foregoing the kinds of benefits they usually waived. For example, nurses often worked without payment beyond the 15 minute report time, missed meals, or remained at their work stations during the night shift even though they were entitled to go off the ward during breaks. According to Hicks, these kinds of practices, rather than work duties, were to be terminated.

10. The nurses called as witnesses by the Ontario Nurses Association explained that the elimination of the extended tours would cause both monetary and personal hardship. Whereas during a 2 week period a nurse on extended tours would normally work 7 shifts, the return to 7.5 hour shifts would result in 12 shifts during this same period. The disruption caused results in added mileage, parking, and particularly additional child care expenses resulting from the days added to the schedule. Although both the pay and the hours of work would remain the same at the end of any 6 week period, the radical redistribution of hours would result in a profound readjustment of family arrangements which had been based on the Hospital's 10 year practice of encouraging extended tours. At least 3 nurses have indicated they would have to resign.

11. Felicity Briggs has been an employment officer with the Ontario Nurses Association since 1978. She gave evidence on behalf of the Association as to the bargaining process. In the Memorandum of Conditions for Joint Bargaining agreed to prior to the submission of the dispute to the Scott Board between the Ontario Nurses Association and the Participating Hospitals (including the Ottawa Civic), Appendix "C" lists the 'Issues Appropriate for Central Bargaining'. The list includes "Paid Holidays (except scheduling criteria)." Paragraph 1(c) of this Memorandum states "... there shall be no bargaining between the O.N.A., or its locals, and any participating Hospital with respect to any central issue, and any agreement on any central issue arising from any such unauthorized bargaining shall be null and void". Briggs stated that there are proposals in the current round of negotiations dealing with extended tours, and that any agreement by the Local revising the terms of the Scott award would be null and void since the issue is one for central bargaining. Although scheduling is a matter left to local negotiations, Briggs stated that Local 90 of the Ontario Nurses Association has no authority to bargain away the monetary award centrally determined.

12. The Hospital's evidence was that they had the right to revert to 7.5 hour shifts pursuant to the terms of the local agreement. The elimination of the extended tours was an attempt to minimize the \$300,000 - \$400,000 anticipated cost of the Scott award without violating that award. The evidence of Kerry Marshall was that the Hospital was not trying to persuade the Association to waive the Scott award, but was trying to reduce the costs of that award through scheduling provisions. The purpose of the Hospital's notice to the nurses was to protect the dual goals of keeping extended tours and minimizing financial liability. Moreover, Marshall stated that under the new schedule, no nurses would be laid off, terminated, or suffer any loss of hours of work. What the Hospital has done, according to Marshall, is return to the language of the contract and schedule the same number of hours in a different way by changing all shifts to 7.5 hours. The net result of the new schedule is to alleviate the impact of the Scott award. All nurses would be paid at the rate of 7.5 hours for statutory holidays since all nurses would be working 7.5 hour shifts.

13. George Williamson, the Hospital's Director of Finance and Administration, stated that although the Hospital had a surplus of \$1,449,000 at the end of its 1984-85 fiscal year, the surplus as of March 31, 1986 was reduced to \$54,000. This year he states that there will be a \$3.7 million over-expenditure arising from drastically increased costs of liability insurance, a pay increase to

technologists of up to 5%, and insufficient government funding. He said he was unable to find any way to deliver the money it would take to pay the \$400,000 cost of the Scott award.

14. Section 1(1)(k) of the *Labour Relations Act* defines “lock-out” as follows:

“lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees.

[emphasis added]

Section 1(1)(o) of the *Labour Relations Act* defines “strike” as follows:

“strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

Both strikes and lock-outs are prohibited by the *Hospital Labour Disputes Arbitration Act*.

15. The Board in *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401 noted the elements required to be proved if there is to be a finding that a lock-out has taken place. It stated:

The definition of “lock-out as found in the Act consists of two elements: the act and the motive or purpose for the act. In order to establish that a lock-out has occurred it is not sufficient merely to show that there has been a closing of a place of employment, or a suspension of work or a refusal by an employer to continue to employ a number of his employees (i.e. a plant closure, relocation, lay-off or contracting out of work etc.). It must also compel *his employees* to refrain from exercising any rights or privileges under the Act or to agree to provisions or changes in provisions respecting terms or conditions of employment etc. Motive is an integral component of the definition and as a result the economic consequences are not in themselves determinative of the issue. The economic consequence must be as a result of one or other of the acts contemplated by the definition having been done by the employer with a view to compel or induce *his employees* in the manner set out in the definition; both the act and the motive must relate to those persons in the employ of the employer as of the date of the lock-out (i.e. “his employees”). (See re *Harry Woods Transport Limited* case, [1976] OLRB Rep. July 341, *Livingston Transportation Limited* case, [1976] OLRB Rep. July 346, *Amalgamated Electric Corporation Limited* case, [1963] OLRB Rep. July 430 *Fleetwood Corporation* case, [1974] OLRB Rep. June 385, *James Howden and Parsons* [1974] OLRB Rep. June 385, *James Howden and Parsons of Canada Ltd.*, [1969] OLRB Rep. July 537 and *Ralph Milrod Metal Products Limited* cases, Board Files Nos. 1274-76-U and 1276-76-U, decision dated February 28, 1977). The definition has been drafted to expansively encompass economic sanctions which are designed to bring pressure to bear on employees for the purpose of compelling or inducing them to make certain agreements or to refrain from exercising rights under the Act. The definition is an integral component of a legislative structure designed to preserve industrial peace during the term of a collective agreement and during the period of conciliation services, and at the same time to allow the employer the freedom to make business decisions during these periods which are not motivated by those factors set-out in the definition. Absent an explicit restriction, the definition must be read to include economic sanctions which compel or induce employees to accept altered conditions regardless of whether these altered conditions fall within or beyond the scope of a subsisting collective agreement.”

The issue before this Board is whether the Hospital’s redistribution of work opportunities is a “suspension of work” and, if it is, whether it was motivated by a desire to compel employees “to agree to provisions or changes in provisions respecting terms or conditions of employment”. The Hospital denies that a suspension of work has taken place since no hours of work or pay have been

reduced, and argues that its motive was to attempt to adjust to the economic burden imposed by the Scott award.

16. In *C.E. Lummus Canada* [1983] OLRB Rep. Oct. 1688, the Board was asked to infer that an unlawful lockout had taken place where the employer had introduced a 4 day 9 hours per day week instead of a 5 day 8 hours per day week without overtime pay for the 9th hour in an attempt to obtain concessions from the union less favourable to the union than the provincial collective agreement. The Board noted:

Given the definition of "lock-out", an employer who speaks during the term of a collective agreement of the need for concessions as a condition of further employment must be mindful of the basic structure of our *Labour Relations Act*. During the term of a collective agreement, an employer is not entitled to simply say, "I want a better deal, and I'm not going to continue to use your services, or part of your services, until I get it". That is prohibited as an untimely "lock-out", just as the opposite conduct on the part of employees and a trade union is prohibited as a "strike". On the other hand, an employer may, from time to time, find himself in a position where economic necessity has raised the spectre of management decisions which will significantly impact on the employment opportunities of his employees. In such circumstances, it would seem to make labour relations sense to permit the employer to invite the bargaining agent to engage in meaningful discussion designed to avoid or minimize such impact, and indeed, this has been a main theme of the Board's "bargaining in bad faith" cases in recent times. Compare *Westinghouse Canada Limited*, [1980] O.L.R.B. Rep. April 577; *Sunnycrest Nursing Home*, [1982] O.L.R.B. Rep. Feb. 261; and *Consolidated Bathurst*, [1983] O.L.R.B. Rep. Sept. 1411. The Board's interpretation of the law ought not simply to deny the employees, through their trade union, (or employee bargaining agency, as the case may be) this opportunity for input in every case where the problem comes to a head during the term of the collective agreement itself. But, as noted, a fundamental prohibition exists against "lock-outs" or threatened "lock-outs" during the term of the collective agreement, just as it does for "strikes", and the Board must be scrupulous in its analysis of each case, lest a plea of "economic circumstance" be used to mask an attempt simply to obtain better terms and conditions than have been agreed upon in the collective agreement. The Board recognizes that the issue of "economic necessity" can be a complex one, making a judgment on the employer's true motivation difficult; but the Board cannot shy away from making such judgments, if employees through their bargaining agent are to be permitted an opportunity to exercise some degree of control over their economic lives, on the one hand, and the identification and control of unfair labour practices, engaged in under a cloak of "economic necessity", is to be achieved on the other.

17. The union argues that the definition of lock-out, governed as it is both by the introductory use of the word "includes" and by the remedial nature of the Act as defined in Section 10 of the *Interpretation Act*, ought to be given an expansive interpretation. In particular, it argues that the word "suspension" should be interpreted broadly to include its dictionary explications as conduct which "interrupts", "postpones", "hinders" or "debars temporarily from a privilege". Under this wider interpretation, the suspension of the extended tours resulting in nurses not working on previously scheduled days, causing some of them to contemplate resigning, and resulting in added economic costs such as childcare, parking and mileage would be a lockout if an improper motive can be shown. The union urges the Board to analogize to a strike situation, whereby lessened productivity but no reduced hours need to be proved.

18. The additional factor which the union asks the Board to take into consideration is the unique nature of the health care sector in which nurses work. These employees, largely female, are particularly vulnerable to shift changes since most of them are combining career with family responsibilities and cannot easily accommodate their childcare duties to drastic fluctuations in schedules. They are therefore particularly vulnerable to a hospital's exerting bargaining pressure where, having lost an economic argument before an interest board, it attempts to obtain concessions by exerting pressure through shift changes.

19. The Hospital argues that there being no loss of hours, work or pay, there is no “suspension of work”. It distinguishes these facts from those in *Lummu* on the grounds that there was in fact a reduction of work in that case. It argues further that in this case the rescheduling of work was done pursuant to the management rights clause and Article 'J' dealing with 'Scheduling Regulations' in the Local Agreement. According to the Hospital, the purpose of the shift changes was not to induce the union to waive rights but to accommodate concerns over the costs generated by the Scott award, particularly since nothing in the Scott award requires the Hospital to maintain extended tours. Disruptions to an employee's personal life and inconveniences caused by scheduling changes although difficult, do not in the absence of a reduction of work create a lock-out even if this results in an employee's resignation.

20. There is no doubt that the Hospital acted in response to economic exigencies, but the main purpose behind the Hospital's elimination of the extended tours was to attempt to induce employees to waive rights granted by the Scott board. But as the jurisprudence makes clear, there must be both a “suspension of work” as well as an improper motive to fall within the definition of a lock-out. The remaining issue therefore is whether a redistribution of work which results in a denial neither of work opportunities nor pay is a suspension where the effect of the redistribution is to cause employee disruptions of a serious nature and potentially results in their resignation.

21. It is conceivable that conduct by an employer designed to 'constructively dismiss' employees for the purpose of inducing them to avoid the implementation of a term of the collective agreement may well constitute a lock-out, but there is insufficient evidence in this case that this is either the motive or general result of the Hospital's action. There is no doubt that the shift change will negatively affect many employees and that it is insensitive to their personal lifestyle needs. But although the Association is correct when it argues that the definition of lock-out should receive an expansive interpretation, it is difficult to see how the elimination of extended tours without a countervailing reduction in hours or pay can be stretched into the definition of “suspension of work”. A “suspension of work” implies the loss of work opportunities, not their redistribution, and in the circumstances of this case, while there is certainly serious inconvenience caused by the redistribution, there is no suspension of the opportunity to work for the same number of hours or rate of pay. Though the motive may be improper, the act complained of does not fall within the definition of section 1(1)(k). As the section contemplates both an improper act and purpose, there is no violation of the lock-out provisions. The appropriate relief must therefore be determined either by the grievance procedure or in the unfair labour practice applications.

22. I now turn to the application for declaration of unlawful strike. In responding to the Hospital's unilateral and disruptive action, the nurses were predictably distressed and disconcerted. Their responses are not surprising in the face of the obvious pressure the nurses feel to waive rights they were legally assigned by Scott's award, and feel justifiably resistant about negotiating given the central bargaining process. Even assuming without finding that their conduct constituted a “strike” within the meaning of section 1(1)(o) of the Act, in the circumstances of this case, it would not be appropriate to exercise the discretion under Section 92 either to make a declaration of unlawful strike or to grant the cease and desist order requested by the Hospital.

23. For all the above reasons, both applications are dismissed.

2594-85-R Pinkerton's of Canada Limited, Applicant, v. Canadian Guards Association, Local 114, Respondent

Abandonment - Termination - Expired collective agreement containing automatic renewal clause - Union failing to give notice for renewal - Whether bargaining rights terminated - Union disorganized and in disarray - Whether bargaining rights abandoned

BEFORE: *Lita-Rose Betcherman*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

APPEARANCES: *Thane O. Woodside* and *M. Lafleur* for the applicant; *R. J. Tracy*, *M. Banfich*, *W. Bednarski*, *C. Schler* and *R. Singer* for the respondent.

DECISION OF THE BOARD; June 19, 1986

1. The name of the respondent is amended to read: "Canadian Guards Association, Local 114".
2. The employer in this case has brought application for a declaration that the respondent no longer represents the employees in the bargaining unit; alternatively, it asks that the Board order a representation vote to determine the wishes of the employees. The application was brought pursuant to section 59(1) of the *Labour Relations Act* which reads:

If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.
3. The applicant supplies security guards for various clients across the country. On September 1, 1983, the respondent was certified as the bargaining agent for the applicant's security guards in the Sudbury area. A first collective agreement was negotiated in July 1984 covering the period from September 3, 1984, to August 31, 1985. Following negotiations, a second collective agreement was executed on February 1, 1985, effective September 3, 1984, to September 3, 1985.
4. It is undisputed that neither party served notice to bargain a renewal of the agreement which expired on September 3, 1985.
5. The applicant asserts that the respondent's failure to serve notice to bargain, combined with the respondent's alleged lack of organization, shows that the respondent no longer represents its employees.
6. The respondent relies upon a clause in its collective agreement which provides for automatic renewal where notice to bargain is not served. This clause reads:

20.01 The agreement shall become effective as of *September 3, 1984* and shall continue in effect until *September 3, 1985* and thereafter from year to year until terminated or amended by either party. Thirty (30) days prior to the expiration of this agreement or any subsequent anniversary date, either party may notify the other of its desire to negotiate amendments and both parties shall thereupon enter into negotiations for renewal of this agreement.

7. Michael LaFleur, the applicant's managing director and vice-president whose functions include labour negotiations, gave evidence as to the circumstances surrounding the negotiations of

the second collective agreement. He testified that the then president of the local association had failed to incorporate a number of agreed-upon amendments to the collective agreement in a typed-up draft and had had to be reminded by the applicant to include them. It is common ground that the net effect of these amendments was to detract from the employees' rights and benefits under the previous agreement. Mr. LaFleur further testified that he had not been contacted by the respondent since negotiations for the second agreement ended in February 1985. In his testimony, Mr. LaFleur made reference to a petition to decertify the respondent, brought by an employee named Rae (hereinafter referred to as the Rae petition). The petition, heard by the Board on December 1, 1984, was dismissed for insufficient support.

8. R. J. Tracy, secretary-treasurer of the respondent's national executive, represented the respondent at the hearing and was its chief witness. He acknowledged that he had sent a letter to the Board on December 1, 1985, charging the applicant with failure to bargain a renewal of the agreement with the respondent when, in fact, an agreement had been signed. He stated that this error was his and his alone, however he freely acknowledged a breakdown in communication with the local association at that time attributing it in part to a change of officers. He asserted that although the local association was "a little rough around the edges", it was not dormant. As evidence of its activity, he introduced newsletters issued by the local executive to the membership in January and March of 1985. He also gave uncontradicted testimony that the local association had filed financial statements and that the employer had continued to deduct union dues. He testified that there had been no complaints to the national executive from local members. Under cross-examination, he admitted that he had no personal knowledge whether the second collective agreement had been ratified by the local membership. He also admitted that signatories to the second agreement had been present at the national executive when he had formed the erroneous impression that the agreement had not been signed. Mr. Tracy stated that it was his understanding that the local association had not agreed initially to the employer's amendments to the second agreement and that that was the reason for their omission from the typed-up draft.

9. By way of reply evidence, the applicant called a bargaining unit employee, one Barry Weller. Mr. Weller testified that he had come to the hearing on his own initiative and without pay. He stated that he had attended all union membership meetings during the period January to March 1985 and that the second agreement had never been ratified by a vote. According to his testimony, the then local president had told the membership that they had no choice but to accept the employer's amendments; at the next meeting, he said, he heard that an agreement incorporating the employer's amendments had been signed.

10. Counsel for the applicant submitted that, notwithstanding the automatic renewal clause in the agreement, the Board should exercise its discretion under section 59(1) of the Act to terminate the bargaining rights of the respondent. Counsel argued that there was no evidence that the respondent had turned its mind to a renewal of the agreement and that on the basis of Mr. Weller's evidence there was even doubt as to the validity of the last agreement. As evidence of the respondent's disorganization, counsel pointed out that the national association was unaware that the last agreement had even been signed. It was suggested that the respondent was disorganized to the point of abandoning its responsibilities, and that the Rae petition indicated that a significant number of employees were disgruntled with the association. Counsel for the respondent cited Board jurisprudence to support its position that the onus is on the inactive union to show that it had not abandoned its bargaining rights.

11. The respondent argued that, by virtue of Article 20.01 of the collective agreement, it did not have to give reasons for not serving notice to bargain, that there was no evidence of mem-

bership dissatisfaction, and that the company was trying to tell the association how to conduct its business.

12. Under section 59(1) of the Act, an employer or an employee may file a termination application where the union has failed to give notice to bargain a renewal of the agreement under section 53, and where the employer has not itself given notice. The purpose of section 53 is to facilitate negotiations for the renewal of a collective agreement. In the instant case, the parties have provided for automatic renewal of their agreement if neither party serves notice of its desire to negotiate amendments. Where an automatic renewal clause such as this exists, the Board has held that there is no obligation on the union to give notice under section 59(1) since the purpose of section 53 has been served: See *Kingston Terminal Restaurant Ltd.*, 60 CLLC 16,163.

13. An automatic renewal clause, however, does not permit a union to sleep on its rights. The Board has held that, as a general rule, after two automatic renewals the onus is on the union to satisfy the Board that it has not abandoned its bargaining rights: See *Belleville and District Builders Exchange*, [1963] OLRB Rep. May 114.

14. At the time this application was filed, the union had had one automatic renewal, commencing on the expiry of the second agreement on September 3, 1985.

15. Even assuming that automatic renewal of the agreement requires a conscious decision on a union's part, the Board is unconvinced that the respondent's failure to give notice to bargain was done without forethought. The respondent had lost ground in the last round of negotiations; therefore it is not surprising that it chose not to reopen negotiations for another round. This is borne out in the reply to the application which states, "Local 114 simply did not feel it prudent in August of 1985 to alter their present Agreement."

16. In the Board's view, the respondent's alleged shortcomings in the negotiating of the second agreement have no bearing on the present application. The collective agreement was jointly executed by the parties and to all intents and purposes accepted by both as valid. Moreover, the evidence discloses no complaints about its ratification or its administration from the membership to the national executive. As for the Rae petition, the fact is that the majority of the employees wanted the respondent to represent them.

17. While the evidence discloses a lack of communication between the local association and the national executive at the time in question, this in itself does not signify abandonment of its bargaining rights by the respondent.

18. The Board can see no justification at this time for overriding the automatic renewal clause duly negotiated by the parties. The application is accordingly dismissed.

3221-84-R Graphic Communications International Union Local 542M, Applicant, v. Rapid Blue Print Inc., Respondent, v. Group of Employees, Objectors

Employee - Practice and Procedure - Witness - Board witness not protected from attacks on credibility - Impugning credibility of employer witness of no assistance in determining disputed employees' duties in certification hearing - Whether xeroxing a clerical function or production work - Employee status determined as of application date - Subsequent promotion must be dealt with in s. 106(2) application

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

APPEARANCES: *J. David Watson* and *Clarke Faulkner* for the applicant; *M. E. Geiger* and *Jerry Dorn* for the respondent; *Shirley (Beaton) Steinke* for the objectors.

DECISION OF PATRICIA HUGHES, VICE-CHAIRMAN, AND BOARD MEMBER I. M. STAMP; June 25, 1986

1. This is an application for certification.
2. A differently constituted panel of this Board issued a decision dated February 5, 1986 with respect to certain matters arising out of the inquiry by a Labour Relations Officer into the accuracy of the list of employees filed by the respondent.
3. One of the matters considered by the earlier panel involved the Officer's refusal to allow counsel for the applicant to put certain questions to Mr. G. A. Dorn, a witness called by the Officer on behalf of the Board. Because Mr. Dorn is the respondent's Vice-President of Operations, counsel for the applicant sought to establish that he was biased and therefore would frame his description of the disputed employees' duties and responsibilities to the respondent's advantage. He attempted to ask Mr. Dorn questions designed to impugn his credibility. The Officer ruled that such questions were improper. The Board stated that "[t]he officer appears to have been of the view that because she called Mr. Dorn as a witness, it was not open to the applicant to challenge his credibility". With respect to the applicant's objection to the Officer's decision, the Board held as follows:
 13. ... The fact that Mr. Dorn was called to testify by the Officer does not mean that his evidence could not be tested by the applicant in the normal course. Having regard to this conclusion, we are of the view that applicant's counsel should be given the opportunity to ask questions of Mr. Dorn that relate to his credibility.
 14. So as to expedite this matter, the Board proposes to have any further questioning of Mr. Dorn done at a hearing before a panel of the Board. Immediately afterwards, the panel will hear the representations of the parties concerning the conclusions it should reach based on the Officer's report as supplemented by the additional questions put to Mr. Dorn.
4. In accordance with the Board's decision of February 5, 1986, a hearing was scheduled for April 25, 1986 at which the applicant examined Mr. Dorn with respect to his credibility and the parties made submissions on the Officer's Report and Mr. Dorn's additional examination before this panel.
5. At the outset of the examination of Mr. Dorn, the respondent's counsel indicated that Dorn had prepared a new diagram of the premises. The original diagram had been the subject of

lengthy questioning during the Officer's inquiry. The applicant's counsel argued (correctly in our view) that he would have the right to ask questions about the new or revised diagram of the layout of the premises if it were admitted by the Board.

6. Having recessed to consider the implications of admitting the new diagram for the scope of the examination, we ruled that we would not admit the new diagram. The purpose of this examination was to permit counsel for the applicant to ask the questions he was not allowed to ask at the inquiry. These were questions related only to Mr. Dorn's credibility. To admit the document would extend the scope of the examination beyond that intended by the Board's decision of February 5, 1986. The examination was not intended to reinstitute the original inquiry. The respondent would have been restricted to the original document in the normal course of events. The departure from the normal course to the extent resulting from the Board's order of February 5, 1986 does not warrant the further departure consequent upon admission of the document.

7. Following the examination of Mr. Dorn which was carried out in the normal fashion, including examination by the respondent and the objectors, the Board heard submissions with respect to the duties and responsibilities of the disputed employees, based on the Officer's Report and the supplementary examination of Mr. Dorn.

8. At this point we feel compelled to comment further on applicant counsel's approach to the evidence in attempting to impugn Dorn's credibility. In our experience, this approach to impugning the evidence of the witness is of little value in matters of this kind. Counsel for the applicant wished to establish that Dorn's testimony should be at best treated with caution and at worst disregarded because of his position with the respondent. Counsel argued that Dorn's description of the duties and responsibilities would be biased in favour of the respondent's desire to include the disputed employees in the bargaining unit. His questions to Dorn were designed to establish a basis for a cautious or suspicious approach to Dorn's evidence; he wanted to show that Dorn was aware of the numbers required by the union to establish a certification position and that he did not want a union. It comes as no surprise to us that Dorn does not welcome the union. He is neither expected nor required to welcome the union. He is required only not to engage in unfair labour practices and not to interfere with the union's and employees' rights under the *Labour Relations Act*. There is no allegation that Dorn acted improperly with respect to the union. We are asked only to be wary of depending to too great an extent on Dorn's testimony. It was open to counsel for the applicant to call as witnesses at the Officer's inquiry any of the disputed employees (Beaton and Scaria had been called as witnesses by the Officer and counsel for both the applicant and respondent had full opportunity to examine them). That evidence would have been more useful to us than a general impugning of Dorn's evidence, if counsel for the applicant considered Dorn's evidence to be inadequate. We agree with the respondent's counsel that it is appropriate to raise the issue of credibility when there are two conflicting pieces of evidence from which to choose. While we agree that the fact that Dorn was the Board's witness does not protect him from attacks on his credibility, we are also of the view that attacks on credibility in a vacuum are of little assistance to a Board attempting to discern the reality of a particular employment context.

9. The applicant disputed the inclusion of six persons in the bargaining unit. These persons were: Beaton, Smith, Vansickle, Findlay and Scaria. The first four persons worked at the respondent's St. Catharine Street location in Hamilton; Findlay worked at the Burlington Plant, and Scaria worked at the King William Street warehouse. The applicant argued that these individuals perform clerical and sales functions, not production functions. The applicant also argued that Beaton and Scaria should be excluded from the unit because they performed managerial functions on the application date, February 28, 1985. The onus is on the party attempting to exclude employees

from the unit: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283. In this case, the onus is therefore on the union.

10. In determining the status of the disputed individuals, the Board is required to base its decision on the duties and responsibilities performed by the individuals on the application date, in this case, February 28, 1985. The Board admitted evidence of duties and responsibilities performed before or after the application date only where it was relevant to determining the duties and responsibilities performed on February 28, 1985: *Research Funds (1976) Ltd.*, [1981] OLRB Rep. Mar. 309; *Druggists' Corp. Ltd.*, [1978] OLRB Rep. Feb. 169.

11. The respondent runs a copying business. Customers come into the premises or order over the telephone; they can pick up their orders or have them delivered. Orders may be printed or they may be xeroxed. It must be appreciated that in this context, xeroxing is an integral part of the respondent's business: xeroxing and printing are the respondent's business. Xeroxing is not incidental to this business. The disputed employees who xerox do so as part of the respondent's enterprise; they do not appear to xerox internal documents (the evidence does not disclose who performs that task). The applicant's counsel urged us to treat the xeroxing as clerical work. But this submission ignores the reality of technological change. Xeroxing in the respondent's work place is the same kind of work as that carried out on the printing presses. The Board cannot be restricted in determining the composition of the bargaining unit simply because the applicant union may not have discerned the direction of technological change. Accordingly, we reject applicant counsel's submission that because the Board has historically certified this union in units excluding clerical and sales staff, we should exclude these particular workers from the agreed upon unit. The cases referred to us by the applicant's counsel did not deal with the issues before us and we do not consider these cases of value without the evidence underlying the Board's decision. We are required to make our decision on the basis of the evidence before us: *Bond Place Hotel*, [1982] OLRB Rep. Aug. 1135. Our conclusions with respect to the status of each of the disputed employees are based on consideration of all the evidence adduced at the Officer's inquiry, the examination of Dorn before this panel of the Board and the particular nature of the respondent's business.

12. We first deal with whether Beaton and Scaria perform managerial functions. We are of the view that neither Beaton nor Scaria performed managerial functions on the application date. Neither Beaton nor Scaria made decisions with respect to hiring, firing, suspensions, discipline, assignment of duties, assessments, layoffs, time off, or similar employment conditions. They had no control or direction over any other employees. Neither Beaton nor Scaria made effective recommendations relating to conditions of employment: *The Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. Mar. 304.

13. Counsel for the union based his argument that Beaton and Scaria should be excluded because they are management primarily on an allegation that they had been promoted within a few days of the application. Scaria was apparently promoted on March 4, 1985 to the position of warehouse manager. His promotion came after February 28, 1985, the application date, as a consequence of the impending retirement of Bill Bernat, who was the warehouse manager on February 28, 1985. However, there is no evidence to suggest that Scaria was performing management functions on February 28, 1985. Counsel for the union argued that this was a highly unusual form of promotion, since Bernat remained on the job and, as the evidence indicates, the roles of Bernat and Scaria were reversed as of March 4, 1985. He suggested that this promotion was "more in name" than reality (as, he said, was Beaton's, considered below). He also attempted to show that Scaria and Bernat shared responsibilities as of February 28, 1985. In our view, Scaria's own evidence supports the conclusion that he was a shipper/dispatcher under the managerial authority of Bernat on February 28, 1985 and we so conclude: exclusion of Scaria from the bargaining unit on

the ground that he exercised managerial functions on February 28, 1985 cannot be sustained. Counsel for the union argued that the effect of including Scaria would be to increase the numbers for the count without increasing the numbers in the bargaining unit because he has left the unit. That is not a matter of concern for this panel. We find below that Scaria, as a shipper/dispatcher, is a member of the bargaining unit. If Scaria is replaced with another shipper/dispatcher, the replacement will be a member of the unit. To the extent the union is concerned about Scaria being declared a member of the unit as of February 28, 1985 when he appears to have held a management position since March 4, 1985 to an unspecified time, the union can bring an application under section 106(2) of the *Labour Relations Act* for a declaration concerning Scaria's status at a specific date subsequent to February 28, 1985.

14. Beaton was promoted on March 1, 1985. There is some suggestion that she knew prior to that date that she would be promoted, but the evidence on this point was not clear. There is also some doubt about the exact nature of the "promotion". Her new title was Production Co-ordinator, a position previously held by an individual named Chesson. Chesson had also been Assistant Manager; however, Beaton did not acquire that title, nor, apparently, the duties connected with it. Although she performed the duties of Production Co-ordinator at times prior to February 28, 1985, during Chesson's absences, the duties attached to that position do not appear to be managerial. They were described as involving "expediting" the various tasks involved in the day-to-day work, and in organizing the production boards. In any case, she was not performing those duties on February 28, 1985. The applicant also referred to the inclusion of Beaton's name in an ad placed in the *Hamilton Spectator*; applicants were directed to call her. It was expected that calls would be made on February 28 by applicants. However, Beaton testified that while her name remained on the ad, she did not in fact take calls. She also attended at meetings in which female employees were disciplined. Her presence was apparently to prevent any allegations of "improprieties" at such meetings. Her presence may have led some employees to believe that Beaton had authority, but there was no evidence to that effect. Finally, Beaton also initialled time cards when other employees forgot to punch in and she admitted that other employees assumed that she had authority to do so. In our view, that "duty", if it was even that, falls far short of the test for performing managerial functions.

15. We accordingly conclude that neither Beaton nor Scaria were performing managerial functions at the operative time.

16. We turn now to the applicant's position that the six disputed employees were performing clerical functions. The submissions were that these individuals, other than Scaria and Boulard, answered the telephone, did xeroxing, filled out orders and had stable work stations and certain kinds of furniture and equipment. Production unit employees not in dispute had a different kind of work environment. Counsel for the applicant made much of the physical layout of the respondent's premises at the St. Catherine Street and Burlington locations. We accept his submission that there were two basic areas, "front" and "back" and that certain kinds of work (printing, cutting, binding and so on) were carried out at the back and other kinds of work (taking orders over the telephone or over the counter, billing and xeroxing) were performed at the front. But we do not accept that different locations necessarily lead to different units, whether in the same plant or between the plants: *Usarco Limited*, [1967] OLRB Rep. Sept. 526. In the first place, we accept that the disputed employees at those locations work both at the front and the back. More importantly, we conclude that the work done at the front is production work or related to production work because of the nature of the respondent's business. Counsel for the applicant urges us to apply a "majority of the time" test if we were to conclude that the work performed by the disputed employees at St. Catherine Street and in Burlington perform both clerical and production functions. We have not found it necessary to consider whether the application of that test would be appropriate in this con-

text since, in our view, the disputed individuals all belong to the production bargaining unit because the work they perform is production work. It is important to note that we premise our decision in part on the particular nature of the respondent's business and on the various functions performed by the disputed employees Beaton, Smith and Vansickle. These employees resemble the description of the disputed employees provided by the dissent in *Wragge Shoes Limited*, [1969] OLRB Rep. Nov. 961 (to which we were referred by the applicant's counsel) rather than that set out by the majority in that case. In addition, one of the employees in that case has duties which seem comparable to Boulard. That evidence was not referred to in the majority decision in *Wragge Shoes Limited*.

17. Scaria is the shipper/dispatcher, responsible for shipping, receiving, filling and verifying orders, informing drivers with respect to their routes and looking after repairs. He is under the supervision of Bill Bernat. He works out of the King William Street location in the warehouse. The applicant argued that Scaria's location isolated him from the members in the agreed-to unit. Dorn, the Vice-President of the company, stated that Scaria had no contact with anybody in the unit, but Scaria himself stated that he deals with the "girls in the office every day" with respect to absent drivers or "delivery boy" and that he had to be in contact with people at St. Catharine Street with respect to the paper supply, although he knew some of the women - Beaton and Smith in particular - by their first names only. Counsel for the applicant urged us not to "sweep" the King William Street location into the bargaining unit, especially since there are no members of the bargaining unit there at this time. Our concern must be for the state of affairs on February 28, 1985, not March 1, 1985 or the day of the hearing. We find that Scaria is not isolated but is dealing with truck drivers on a daily basis; truck drivers are part of the bargaining unit. We also find he is in contact with Beaton and Smith whom we find to be part of the bargaining unit.

18. Boulard is the estimator, located in the reproduction office at the St. Catharine Street location. She spends over 70% of her time at her desk but her job requires her to liaise with the technical staff. She regularly comes into contact with the people in the bargaining unit; however, she is actually located in the same area as Mrs. Woods, the secretary, who was excluded from the bargaining unit on agreement. Counsel for the respondent urged us to apply the community of interest rule to her since she decides how jobs are to be done and is in regular contact with members of the agreed-to bargaining unit. The only people excluded from the unit, he argued, are management or Woods, and therefore Boulard might be denied any collective bargaining rights if we do not include her in the production unit. Alternatively, she could be categorized as plant clerical and included in the production unit on that basis. Counsel for the union pointed out that Boulard reports directly to Dorn, while the other disputed employees report to Chesson and that she is responsible for invoicing, an "archetypal office function".

19. Beaton has done many jobs at Rapid Blue Print and was acknowledged by Dorn to be an experienced and versatile employee. She works in the production department at the St. Catharine Street location. She spends about 5% of her time answering the telephone and about 10% of her time xeroxing. She fills out printing orders, works as a cutter binder (but does little of it now) and works beside the pressman; she has replaced the driver and been involved in white printing, retouching and binding. The only work she has not done has been on the camera, in the art department and on the printing press and she has never been the telephone receptionist. According to Dorn, she spends more than 50% of her time at her desk and less time xeroxing than Smith or Vansickle but more time writing orders than Vansickle. Beaton herself stated that she works at the printing order desk and is a backup for the xerox. She works from 8:30 a.m. to 5:00 p.m., the "front hours" in her words.

20. Findlay works at the Burlington location in the service area where customers are

served. She operates two xerox machines, prepares and retouches negatives, takes technical information from incoming orders, and does packaging. She xeroxes about 60% of the orders she takes. Her work breaks down into about 10% clerical, 30% production and 60% processing orders.

21. Smith is the switchboard and xerox operator at the St. Catharine Street location. She spends about 5% of her time answering the telephone (although Dorn testified this was her "first duty") and about 10% of her time xeroxing. She writes printing and reproduction orders and issues dockets. These other functions and the nature of this respondent's business differentiates Smith from the switchboard operators in *Bond Place Hotel*, [1982] OLRB Rep. Aug. 1135, which the applicant's counsel urged us to follow.

22. Vansickle also works at the St. Catharine Street location. She spends about 5% of her time answering the telephone and about 85% of her time xeroxing. She also somehow spends about 15% of her time dealing with customers over the counter, processing orders and doing binding and white printing where necessary. She makes up the reproduction orders, writing out most of the production orders coming from salespersons and on pickup. Her work station is next to the counter and the two xerox machines are next to her work station. She is in regular contact with the members of the bargaining unit. Counsel for the applicant submitted that her primary duty was as receptionist and that she did xeroxing only when she was not busy.

23. In our view, all the evidence, assessed carefully, indicates that all six disputed employees perform functions which are themselves production functions or which are integral to the production work. Xeroxing in the context of the respondent's business is production. Findlay is largely occupied with xeroxing and therefore is included in the agreed-to bargaining unit. Counsel for the applicant candidly admitted that the applicant was not "pressing" the issue of Findlay to the extent of the other disputed employees. Boulard's job as estimator is so integral to the production work that she has a community of interest with the employees in the production unit. Scaria's work is also integrated with the drivers, members of the agreed-to bargaining unit. Beaton, Vansickle and Smith perform similar functions, including xeroxing, which we have found to be production work; alternatively, they interchange with the production unit employees and their work at the front is often done in conjunction with members of the agreed-to unit and they therefore share a community of interest with the employees in the production unit.

24. In summary, we conclude that Scaria and Beaton do not perform managerial functions and are therefore not excluded from the unit on that basis; Findlay is included in the agreed-to unit because she performs production work; and that Scaria, Beaton, Smith, Vansickle and Boulard are included in the agreed-to unit because they perform production work or, alternatively, have a community of interest with the employees in the production unit.

25. The inclusion of the six disputed employees in the bargaining unit results in the Board finding that more than forty-five percent but less than fifty-five percent of the employees were members of the applicant on March 11, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

26. Accordingly, the Board directs the taking of a representation vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant union. All employees in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

27. This matter is referred to the Registrar.

DECISION OF BOARD MEMBER B.L. ARMSTRONG;

1. I dissent.

2. The mandate of the Board under subsection 6(1) of the Act is to determine “the unit of employees that is appropriate for collective bargaining”. The practice of the Board in exercising this mandate has been to certify the clerical and production employees in separate bargaining units except where this practice would deprive certain employees of their right to bargain collectively: *H. Gray Ltd.*, 55 CLLC 18,011; *Canada Iron Foundaries Ltd.*, 56 CLLC 18,017; *P. F. Collier & Son Ltd.*, [1966] OLRB Rep. Sept. 408; *Town of Oakville*, [1973] OLRB Rep. May 260. Such circumstances do not arise in this application. On the contrary, it is the failure to follow this practice which may deprive employees of their collective bargaining rights. The evidence contained in the report of the Labour Relations Officer clearly indicates that the duties of the three ‘front office’ employees at the Catharine Street location in Hamilton (Beaton, Smith and Vansickle) were essentially clerical in nature.

3. For example, it was the evidence of Mr. Dorn (at p. 76) that these three employees worked in that portion of the Catharine Street premises described by him as “the office area”. He stressed (at p. 77) that the general function of Beaton Smith, and Vansickle was to deal with customers, and that Smith and Vamnsickle did this work to a greater extent than the other employees. Vansickle was described (at p. 94) at the “estimator and billing clerk” who worked at her desk more than 70 percent of the time. While much was made of the xeroxing functions of these employees, only about ten percent of Beaton and Smith’s time would be spent up front doing xeroxing (at p. 23). Further, it is clear that the xerox work was to a large extent self-regulating and that, aside from unloading and loading, this work did not take these employees away from their customer service functions (at p. 130-131). By contrast, production employees doing printing had no other work assigned to them during the operation of those machines. Overtime work in “the office area” was shared between Beaton, Smith and Vansickle. None was shared with production employees because, as Mr. Dorn stated (at p. 77) “they’re not trained to do it”. All these facts are evidence of the separate and distinct nature of the clerical work performed by these three employees which would make their inclusion in the production unit inappropriate.

4. Although the Board has on occasion included plant clerical staff in the plant unit (as in *Wakefield Lighting Ltd.*, [1965] OLRB Rep. May 143; *Domtar Chemicals Ltd.*, [1968] Oct. 719), it is clear from the Board’s practice of certifying production employees separately that a unit excluding Beaton, Smith, and Vansickle would still be an appropriate unit for collective bargaining within the terms of the Board’s mandate.

5. In *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, the Board stated:

In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that group is seen by the Board as sufficiently conforming to the Board’s criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would impede the access of that group of employees to any collective bargaining at all.

6. It is clear from the evidence that the employer ‘knew the count’. It knew that the inclusion of Beaton, Smith, and Vansickle in the bargaining unit could ‘tip the scales’ against the union, depriving production employees of their right under the Act to free collective bargaining.

7. Given this state of affairs, I am of the opinion that the Board should exercise its discretion in such a way as would not reward this employer - or any future employer - for ‘padding the

list'. It should not choose a unit which would in effect deprive employees of their right to bargain collectively.

8. I am also of the opinion that Beaton should be excluded on managerial grounds. She replaced Mr. Chesson, the assistant manager, when he was away on vacation (p. 89). She made recommendations in terms of scheduling (p. 89). She initialed - at least occasionally - the time cards of other employees (p. 151). She sat in on discipline meetings of other employees (p. 171). Mr. Dorn conceded that because of her vocal and outspoken manner she might be identified with management by other employees (p. 89). Indeed, the listing of her name as the contact person for a job vacancy listed in the newspaper indicates to me that this impression may also have legitimately been held by members of the public. Her function, in this regard, was at the least one of pre-screening employment applicants (p. 87). All these facts add up to a picture of a person who, in effect, acted as the *alter ego* of management. Such a person has been excluded from the bargaining unit by the Board as falling within the managerial exclusion: *Steep Rock Iron Mines Ltd.*, [1968] OLRB Rep. Apr. 105.

9. For these reasons I am unable to concur with the inclusion of Beaton, Smith, and Vansickle in the bargaining unit.

1386-83-R; 2883-83-R; 0217-85-U RPKC Holding Corporation, Applicant, v. Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, Respondent, v. Dominion Stores Limited, Intervener #1, v. Willett Foods Limited, Intervener #2; Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, Applicant, v. Dominion Stores Limited, Willett Foods Limited, and RPKC Holding Corporation, Respondents; Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, Applicant, v. Dominion Stores Limited, Willett Foods Limited, and RPKC Holding Corporation, Respondents

Charter of Rights and Freedoms - Interference in Trade Unions - Related Employer - Sale of a Business - Unfair Labour Practice - Whether reverse onus in s. 89(5) contrary to presumption of innocence in Charter - Dominion chain store changing to Mr. Grocer franchise operation - Character of business not changed to cause Board to terminate bargaining rights under s. 63(5) - Difficulties in applying collective agreement not reason to terminate - Whether related employer declaration made - Decision to franchise not tainted - Hiring of employees without regard to seniority and recall rights in collective agreement unlawful

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *J. W. Murray* and *W. F. Rutherford*.

APPEARANCES: *James Hayes, Sheila McIntyre, Kathleen Martin* and *Robert McKay* for Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC; *R. C. Fillion* and *C. R. Robertson* for Dominion Stores Limited and Willett Foods Limited; *Barry W. Earl* and *Ronald Ferencz* for RPKC Holding Corporation.

DECISION OF ROBERT D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; June 4, 1986

1. File No. 1386-83-R is an application under section 63 of the *Labour Relations Act* in which RPKC Holding Corporation ("RPKC") requests the Board to terminate the bargaining rights which RPKC concedes were acquired by Retail, Wholesale and Department Store Union, Local 414 (referred to in this decision as the "Union" and as "Local 414") by virtue of a sale of a business by Dominion Stores Limited (referred to in this decision as "Dominion" and as the "Company") to RPKC. In that application, which was filed with the Board on September 23, 1983, RPKC alleges that a change in the character of the business has taken place so as to make it substantially different from the business of Dominion. On November 3, 1983, the hearing of that application initially scheduled for November 8, 1983 was adjourned on the agreement of the parties to a date to be fixed by the Board in consultation with the parties, following completion of the "related proceedings" that were then pending before the Board, differently constituted, in respect of Penmarkay Foods Limited ("Penmarkay"), in File No. 1045-83-R. The Board's decision in that matter (and in File Nos. 0903-83-R, 0904-83-R, and 0905-83-U) issued on September 24, 1984, and was subsequently reported in [1984] OLRB Rep. Sept. 1214.

2. File No. 2883-83-R is an application under section 1(4) of the Act, in which the Union alleges that associated or related activities or businesses are being carried on under common control or direction by Dominion, RPKC, and Willett Foods Limited c.o.b. as Mr. Grocer ("Willett"). It was filed with the Board on March 9, 1984.

3. File No. 0217-85-U is a complaint under section 89 of the Act in which the Union alleges that it has been dealt with by Dominion, Willett, and RPKC contrary to the provisions of sections 50, 64, 66, and 67. That complaint was filed with the Board on April 29, 1985.

4. On May 7, 1985, we heard submissions concerning three preliminary matters raised by counsel for RPKC in relation to the Union's complaint in File No. 0217-85-U. (RPKC's position concerning those matters was supported by counsel for Dominion and Willett.) In an unreported decision dated May 10, 1985, we made the following unanimous rulings concerning those matters:

Having carefully considered the submissions of the parties, we have concluded that although there has been some unexplained delay on the part of the complainant in filing this complaint, the prejudice, if any, that the respondents have suffered as a result of such delay can be adequately addressed in the Board's remedial response to the complaint, in the event that the complaint succeeds. We are also not persuaded at this point in the proceedings that the Board should decline to hear this complaint on the basis of deferral to arbitration. However, this ruling does not preclude counsel for the respondents from renewing that request as part of their concluding arguments in this case, which is to be heard together with applications under section 63(5) (File No. 1386-83-R) and section 1(4) (File No. 2883-83-R).

With respect to the matter of particulars, we hereby direct the complainant to forthwith provide to the respondents all of the particulars within its knowledge concerning paragraphs 18, 19, and 24 of Schedule "D" to the complaint, in accordance with section 72 of the Board's Rules of Procedure.

5. The hearing of the merits of these files commenced on May 15, 1985, and continued on May 16, August 21, September 5, 9, 12, 30, October 2, 3, 30, 1985, and January 21, February 4, and February 5, 1986. On June 17, 1985, the Board heard the submissions of counsel for each of the parties with respect to the position asserted by Mr. Filion (on behalf of Dominion and Willett) and adopted by Mr. Earl (on behalf of RPKC) that section 89(5) of the *Labour Relations Act* (the "Act") offends sections 11(d) and 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter"). In an unreported unanimous decision dated July 23, 1985 concerning those matters we wrote, in part, as follows:

.... For reasons which will be included in our final decision in these proceedings, we are satisfied

that section 89(5) does not offend section 11(d) of the Charter. We have also concluded that it is unnecessary for the Board to decide at this stage of the proceedings whether section 89(5) of the Act offends section 15(1) of the Charter. Assuming, without deciding, that Mr. Filion is correct in that regard, and that the section 89(5) reversal of the legal burden of proof is inoperative, the Board, as master of its own practice and procedure under section 102(13) of the Act, is of the view that this is nevertheless an appropriate case in which to call upon the corporate respondents to proceed first with their evidence on all aspects of the matters presently before us, which involve an application by RPKC Holding Corporation under section 63(5) of the Act (File No. 1386-83-R), an application by Retail, Wholesale and Department Store Union, Local 414 (the "Union") under section 1(4) of the Act (File No. 2883-83-R), and a complaint by the Union under section 89 of the Act (File No. 0217-85-U). In this regard, we note that the corporate respondents would be required to proceed first in order to fulfil their evidentiary obligations under section 1(5) of the Act in any event. Moreover, in view of the interrelatedness of the matters covered by the three files, we are satisfied that calling upon the corporate respondents to proceed first with their evidence on all aspects of the matters which are before us in these proceedings will expedite the hearing and reduce the likelihood that a substantial amount of hearing time will be devoted to submissions and rulings concerning such matters as the proper scope of the evidence to be adduced by the various parties in chief, in defence, and in reply, and the proper scope of examination in chief, cross-examination, and re-examination at various stages in the proceedings. This procedural ruling will not, of course, in any way affect the legal burden of proof in these proceedings. Should it become necessary for the Board to decide the section 15(1) Charter issue, we will do so in our final decision in respect of these proceedings.

6. Section 11(d) of the Charter provides that "[a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Section 89(5) of the Act provides:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

Our reasons for concluding that section 89(5) does not offend section 11(d) of the Charter are set forth below.

7. The Board was first called upon to rule on that issue in *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261. In rejecting the contention that section 89(5) contravened the Charter's presumption of innocence provision, the Board (differently constituted) wrote as follows in that unanimous decision:

28. It should be stressed that neither the Board nor the courts have ever viewed a complaint under section 89 of the Act as being penal or quasi-criminal. Section 96 makes specific provision for the prosecution of offences under the Act. A prosecution arising out of an alleged offence under the Act can be taken only with the consent of the Board granted pursuant to an application under section 101(1) of the Act. Consent is granted only where a triable issue or *prima facie* case is established and where the Board is satisfied that the prosecution will "serve the interests of the bargaining relationship between the parties or generally advance the interests of collective bargaining in the Province". (*Fleck Manufacturing Company* [1978] OLRB Rep. July 615.) Any prosecution for an offence under the Act must be initiated by information pursuant to the *Provincial Offences Act* R.S.O. 1980 c. 400, s. 24 and heard by a provincial offences Court. Section 89 of the Act and the reverse onus provision have no application in those proceedings.

29. The remedial authority of the Board under section 89 is directed to very different purposes. Part of the thrust of the 1975 amendments to the *Labour Relations Act* was to provide greater scope for civil redress, as an alternative to criminal prosecutions, in the resolution of unfair labour practice complaints. The broad remedial authority given to the Board in section 89 represents a conscious policy choice to give the Board the jurisdiction to fashion the kinds of civil remedies that will best advance the purposes of the statute. Since the 1975 amendments a party

seeking consent to prosecute has a substantial burden, given the Board's presumptive view that the remedies available under section 89 are, generally, more constructive than a criminal prosecution in the promotion of good industrial relations, (*A.A.S. Telecommunications Ltd.* [1976] OLRB Rep. Dec. 751 at 761).

30. With that purpose in mind the Board has consciously refrained from allowing its remedial orders to become in any way punitive. (*Radio Shack*, [1979] OLRB Rep. Dec. 1220.) As the decision in *Radio Shack*, as confirmed by the Court, (Sub. nom. *Re Tandy Electronics Ltd. and United Steelworkers of America*, (1980) 30 O.R. (2d) (Div. Ct.) made clear, any relief ordered by the Board on a finding of an unfair labour practice under section 89 of the Act must be compensatory and not punitive. As the Court observed at p. 47 (O.R.):

So long as the award of the board is compensatory and not punitive, so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board.

Section 89 of the Act has, therefore, been consistently viewed by the Board, with the approval of the courts, as remedial and not punitive legislation. The purely civil and remedial nature of the Board's jurisdiction under section 89 raises good reason to doubt whether the presumption of innocence which applies to the prosecution of offences under the *Charter of Rights and Freedoms* can have any bearing on unfair labour practice complaints under that section.

31. By introducing the reverse onus provision into section 89 of the *Labour Relations Act* in 1975 the Legislature imported into the Board's procedures a principle already well rooted in labour law. In arbitral jurisprudence the principle was well established that in discipline cases the onus is on the employer to prove, on the balance of probabilities, that the grieving employee was disciplined or discharged for just cause. (*International Nickel Company* (1968) 19 L.A.C. 397 (Schiff).) In this regard arbitral authority has followed the common law; it has for some time been the rule in actions for wrongful dismissal that once an employee has proved hiring and dismissal, the defendant employer has the burden of proving that the dismissal was for just cause (*Butler v CNR* [1940] 1 D.L.R. 256 (Sask. C.A.); see also, generally McGlyne, *Unfair Dismissal Cases* (2nd ed.) (London 1979), Harris, *Wrongful Dismissal* (Toronto 1978).)

32. Placing the onus on the employer, and requiring the employer to proceed first in the arbitration of discipline cases may be justified on the theoretical basis that in fact the employee has created just cause for discharge or discipline by conduct inconsistent with his contract of employment. On that basis the proof of just cause can be said to lie with the employer who, in effect, asserts a breach of the employee's contract. A more practical justification for the reverse onus rule is the simple fact that the employer is the party with complete knowledge of the grounds for an employee's discharge or discipline. Absent the most extensive written explanation for the company's action, a discharged employee would, at arbitration, be in the problematic position of having to disprove a negative. It has therefore long been accepted in labour arbitration that the employer, which has exclusive knowledge of the reasons for discipline or discharge, is better placed to satisfy any evidentiary onus that can apply in the arbitration of an ensuing grievance (*Massey Ferguson Industries Limited*, (1969) 20 L.A.C. 178 (Weatherill) at 179-80).

33. The same general principles apply to the reverse onus which comes into play under section 89(5) of the Act where it is alleged that an individual has been dealt with contrary to the provisions of the Act by his or her employer. Under that section the employer has the onus of establishing that it did not act contrary to the Act. It is not the function of the Board to decide whether there was just cause for discharge or discipline, but to determine whether the employer applied some sanction to the employee because he or she supported a union or sought to exercise any other rights under the Act. (*Toronto Star*, [1971] OLRB Rep. Sept. 582; *Mount Forest Caskets Limited*, [1980] OLRB Rep. June 853.)

34. The reasons for a discharge, discipline, layoff, transfer, demotion or any other such action are best known by the party that imposed it. Implicit in the requirement of a reverse onus is the realization that it would be procedurally unfair to require an employee to prove the motive for his discharge. The very question at issue why an employee was discharged, disciplined or otherwise dealt with by his employer, is best answered by the party which made the decision. The Board has stated that to discharge the onus under section 89(5) the employer has to satisfy two

requirements. Firstly it must bring forward all of the reasons which motivated its discharge of an employee and, secondly, it must establish that anti-union animus played no part in its reasons. As a matter of evidence the onus comes into play only when the evidence is evenly balanced, at which point it tips the scale in favour of the complainant (*The Barrie Examiner*, [1975] OLRB Rep. Oct 745). As a practical matter the Board, like boards of arbitration, has ruled that generally the reverse onus is better applied by requiring the employer to proceed first in the hearing of a section 89 complaint (*I.C.B. Warehousing Division of Alar-Anson*, [1976] OLRB Rep. Oct. 621). The Board, with the endorsement of the Court, has found that the failure of an employer to call any evidence upon the hearing of a section 89 complaint results in the conclusion that the allegations made in the complaint must be taken as proved. (*Windsor Airline Limousine Services Ltd.*, [[1980] OLRB Rep. Feb. 272, aff'd (1980) 30 O.R. (2d) 732 (Div. Ct.)].)

35. Initial fears that the reverse onus might work a hardship on employer respondents and force them to litigate when the specific charges against them were unclear have not, in our experience, been borne out. Since its earliest decisions involving the reverse onus the Board has held complainants to strict standards of particularity in their allegations to avoid any prejudice, hardship or surprise to respondents who are required to discharge the reverse onus. Moreover in the arbitration of discharge cases the empirical evidence appears to demonstrate that at least to the extent of establishing cause for some discipline, employers are more successful than grievors, notwithstanding the reverse onus there applied. (See Adams, *Grievance Arbitration of Discharge Cases*, Industrial Relations Centre, Queen's University at Kingston, 1978, at pp. 42-3.)

36. The reverse onus provision in section 89(5) of the *Labour Relations Act* is both purposive and historically rooted. For the reasons canvassed above, it is consistent with the more efficient advancement of the policies of the Act, and is in keeping with the extensive experience of the civil courts in wrongful dismissal cases and boards of arbitration in discipline cases generally. Nor is it inconsistent with the general precepts of due process or natural justice in civil cases. The location of the burden of proof does not prevent either party in a complaint before the Board from being fully and fairly heard. In practical terms, as the Board's decision in *The Barrie Examiner* indicates, the reverse onus provision has a bearing only in that small minority of cases in which the evidence is so evenly balanced that no precise determination can be made on the balance of probabilities.

37. In our view, for all of the foregoing reasons, the provisions of section 89(5) of the Act do not contravene the presumption of innocence provisions of the *Charter of Rights and Freedoms*. That provision is expressly stated to apply to the prosecution of "offences", and is therefore intended to operate in the realm of criminal proceedings. Complaints under section 89 of the *Labour Relations Act* are civil and remedial, not criminal and penal, and that part of the Charter does not apply to them. We are likewise satisfied that section 89(5) is in keeping with established common law principles which can in no way be said to be contrary to the rules of natural justice or to the principles of fundamental justice preserved and protected by article 7 of the *Charter of Rights and Freedoms*.

8. In *Constellation Hotel Corporation Ltd.*, [1983] OLRB Rep. March 335, the majority of another panel of the Board, after referring to and quoting from the *Third Dimension* decision, wrote, in part, as follows:

6. The Board having turned its mind to this issue and rendered a decision, it would not be inclined to entertain the issue a second time, unless it is shown that some pertinent argument can be made that was not available to the Board in the earlier case. In this regard the respondent relies on the Reasons for Judgment of the Ontario Court of Appeal in *Her Majesty the Queen v. Oakes*, which were released February 2, 1983, (leave to appeal to the Supreme Court of Canada granted March 21, 1983) and which were not made available to the Board in *Third Dimension*, *supra*. But the *Oakes* cases dealt with the connection between "proved" and "presumed" facts in a reverse-onus provision in criminal proceedings under the *Narcotics Control Act*; it did not consider the issue of what constitutes an "offence" under the *Charter*. The *Oakes* case does not, therefore, affect the above-cited reasons of the Board in *Third Dimension*. Section 96(1) of the *Labour Relations Act* provides:

96.-(1) Every person, trade union, council of trade unions or employers' organization

that contravenes any provision of this Act or of any decision, determination, interim order, order, direction, declaration or ruling made under this Act is guilty of an offence and on conviction is liable,

- (a) if an individual, to a fine of not more than \$1,000 or
- (b) if a corporation, trade union, council of trade unions or employers' organization, to a fine of not more than \$10,000.

The word "offence" is not suggested to have any independent significance outside of the context of section 96 (and the related sections which follow it), and that section provides that "every person ... that contravenes any provision of this Act ... is guilty of an offence and *on conviction* is liable..." The section then goes on to provide for the levels of penal consequences, by way of fines, which may flow from such conviction. This, indeed, appears to be the sole purpose of section 96(1), in considering the matter of what are termed "offences" under the Act; i.e., to provide for the penal consequences which are to flow in the event of a conviction. And it is acknowledged by the respondent that only the Provincial Court can make such a conviction. No "conviction" of an offence, as the words appear in section 96, can be made in proceedings before the Board. Indeed, the prosecution in Provincial Court of an "offence" under section 96(1) requires, even after the consent of the Board in section 101, a complete trial *de novo*, as noted in *Third Dimension, supra*. The principle of "innocent until proven guilty" is well known to the penal law of this and related jurisdictions, as noted, e.g., in *Her Majesty the Queen v. Oakes, supra*, and did not begin with passage of the *Charter of Rights*. It is worth noting, in conclusion therefore, that the Legislature of the Province, in enacting section 89(5) of the *Labour Relations Act*, chose not to extend the reverse onus to the prosecution of offences in Provincial Court, notwithstanding that precisely the same allegations may be in dispute with the same practical arguments in favour of having the employer proceed first. As to whether a corporation is a "person" for the purposes of the *Charter*, now see *PPG Industries Canada Ltd. v. AG of Canada* (B.C.C.A.), released February 4, 1983, as yet unreported, (leave to appeal to Supreme Court of Canada granted March 21, 1983).

In *Knob Hill Farms Limited*, [1983] OLRB Rep. July 1087, the majority of yet another panel of the Board rejected the argument that section 89(5) is in conflict with section 11(d) of the *Charter*. In doing so, they noted that the *Constellation Hotel* decision had definitively dealt with the issue and established the Board's policy in respect of that matter.

9. In asking the Board to find that section 89(5) is of no force or effect, Mr. Filion referred the Board to *Re Lazarenko*, [1984] 2 W.W.R. 24 (Alta. Q.B.) in which Sinclair C.J.Q.B. concluded that section 11(c) of the *Charter* (which gives any person charged with an offence the right not to be compelled to be a witness in proceedings against that person in respect of the offence) applied to disciplinary proceedings initiated by the Law Society of Alberta against one of its members. The member in question had been notified by the Society that a benchler would investigate whether he was "guilty of conduct deserving of sanction" in respect of an allegation that he had "needlessly abused, hectored and harassed" a Crown witness during a criminal trial in which he was representing the accused. In finding section 11(c) to be applicable, Sinclair C.J.Q.B. referred to Webster's Third International Dictionary which defined "offence" to mean "a breach of moral or social conduct", "an infraction of the law", and defined "charge" as meaning "to bring an accusation against: call to account: ... to make an assertion against especially by ascribing guilt or blame for an offence or wrong". However, he also noted that the sanctions which could be imposed on the member ran "from reprimands and costs to penalties not exceeding \$10,000, and to suspension and striking off the roll."

10. Mr. Filion urged us to adopt similar definitions and to find that the Union's aforementioned section 89 complaint charges the corporate respondents with an offence. However, we are not persuaded that it would be appropriate for us to do so. It is apparent from the authorities referred to in the *Lazarenko* case that a number of other courts have come to a different conclu-

sion concerning the scope of section 11 of the Charter. For example, in *Re James*, (1983) 143 D.L.R. (3d) 379 (S.C.B.C.), Murray J. held that section 11 of the Charter does not apply to disciplinary proceedings against a member of the British Columbia bar because such proceedings are civil in nature. In reaching that conclusion, he expressed the view that section 11 of the Charter applies to criminal matters only and has no application to civil proceedings. The Manitoba Court of Appeal reached a similar conclusion in *Man. Law Soc. v. Savino*, [1983] 6 W.W.R. 583. Moreover, the disciplinary proceedings with which Sinclair C.J.Q.B. was dealing in *Re Lazarenko* are clearly distinguishable from proceedings under section 89 of the Act. Mr. Lazarenko was charged with being “guilty of conduct deserving of sanction”. The sanctions which could be imposed on him as a result of those proceedings included penalties of up to \$10,000, suspension, and being struck from the roll. By way of contrast, if the Union’s section 89 complaint succeeds, only remedial and compensatory relief can be awarded, as the Board has no jurisdiction to impose punitive sanctions on a respondent under section 89. Such sanctions can only be imposed by a court in prosecution proceedings for which sections 96 to 101 of the Act provide.

11. The Ontario Court of Appeal has also indicated that the ambit of section 11 is “criminal and penal matters”. In *R v. Cohn* (1984), 15 C.C.C. (3d) 150, at page 161, Goodman J.A. wrote, in part, as follows in delivering the judgment of the Court:

The heading which precedes s. 11 of the Charter reads: “*Proceedings in criminal and penal matters*”. The portion of s. 11 which determines in the first instance the persons who may derive the benefit thereof is the first line which states: “Any person charged with an offence has the right...”. The heading to s. 11 makes it clear that s. 11 of the Charter applies to an offence although it may not be, strictly speaking, a criminal matter. It is sufficient if it is a penal matter.... The word penal, as used in the heading undoubtedly bears the dictionary meaning, “of, pertaining to or relating to punishment”....

(If, as contended by Mr. Filion, Goodman J.A. erred in treating a “marginal note” as a “heading”, that is a matter to be corrected by the Supreme Court of Canada, and not by this Board.)

12. Further support for the Board’s conclusion that section 11(d) does not apply to proceedings under section 89 of the Act is provided by the Divisional Court decision in *Re Commodore Business Machines Ltd. et al, and Minister of Labour for Ontario et al.* (1984), 49 O.R. (2d) 17. In delivering the oral judgment of the Court dismissing an appeal from a decision by a Board of Inquiry awarding compensation by way of damages under the *Ontario Human Rights Code*, R.S.O. 1980, c. 340, Steele J. ruled (at page 23):

The eighth and last point was that the appellants submitted that they were denied their legal rights under s. 7 and s. 11 of the *Canadian Charter of Rights and Freedoms*. While the Charter should be given a broad and liberal interpretation, we are not convinced that a decision of the board under s. 19 of the Act that finds a contravention of the Act and awards compensation, falls within s. 11(d) of the Charter which relates to being charged with an offence. We do not need to decide the effect of the Charter on a charge laid under s. 21 of the Act. It was conceded by counsel for the appellants that if we are convinced that there was no denial of natural justice s. 7 is inapplicable. We are so convinced.

[emphasis added]

13. As noted by counsel for the Union, the Canada Labour Relations Board (the “CLRB”) has been called upon to consider the applicability of section 11(d) of the Charter to the “burden of proof” provisions found in section 188(3) of the *Canada Labour Code*. That subsection provides that the *Canada Labour Code* equivalent to a section 89 complaint “is itself evidence that [a] failure [to comply with subsection 184(3), which is the pertinent unfair labour practice provision of the Code] actually occurred and, if any party to the complaint alleges that such failure did not occur,

the burden of proof is on that party.” In *Scotian Shelf Traders Ltd.* (1983), 4 CLRBR (NS) 278, after citing the OLRB’s decision in *Third Dimension Manufacturing Limited*, *supra*, the CLRBR concluded (at page 286) that an employer against whom such a complaint was made could not be considered to be a person charged with an offence within the terms of section 11(d) of the Charter. (See also *Can-Am Services* (1984), 8 CLRBR (NS) 309.) The CLRBR went on to deal with section 1 of the Charter in the context of that provision (at pp. 286-7):

.... The Charter of Rights says in s. 1 that the rights and freedoms set out in it are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. If an argument can be made that s. 188(3) is a “limit” - and we are not suggesting that it might be; we are only being hypothetical - is it a “reasonable” limit prescribed by law as can be “demonstrably justified in a free and democratic society”? We believe the answer must be in the affirmative.

Section 184(3), to which 188(3) applies says in effect that no employer shall refuse to employ or get rid of an employee or suspend, transfer, lay-off or “otherwise discriminate” against a person in respect of any aspect of employment or threaten, intimidate or “otherwise discipline” any person because that person engaged in any of a lengthy list of things. When an employer does take any of the foregoing actions against a person, he knows, and only he knows, exactly why he took such action. It would be totally perverse and unjust to a person dismissed by an employer, for example, in order to seek redress, to have to prove before a labour relations board what was in the employer’s mind, what was the employer’s real motive, without any opportunity being provided to probe that employer. The real effect of s. 188(3) is that it requires an employer to explain his action against an employee; he cannot maintain silence as in a criminal proceeding and leave the employee (who does not have the resources of the State behind him) to do the frequently impossible job of proving that the dismissal occurred because of one of the grounds listed in s. 184(3). This, in the context of industrial relations, provides a greater degree of procedural fairness, makes it possible to get at the truth of an incident, all without derogating in any way from the reasonable and fair rights and freedoms of an employer. Section 188(3) is, in our view, clearly and “demonstrably” justified in a free and democratic society, which we take Canada to be by definition.

We respectfully agree with that reasoning and adopt it in the context of section 89(5) of the Act as an alternative basis for declining to find that subsection to be of no force and effect.

14. As noted above, Mr. Filion also argued that section 89(5) of the Act offends section 15(1) of the Charter. However, in the circumstances of this case, we find it unnecessary to deal with that argument. As noted by the Board in paragraph 8 of *Knob Hill Farms Limited*, *supra*, section 89(5) “is only triggered where there is no evidence before the Board or where the evidence before the Board is equally balanced.” Neither of those situations obtains in the instant case. Thus, it has been unnecessary for us to apply section 89(5) in deciding the Union’s section 89 complaint.

15. Eight persons were called to testify before the Board and 97 exhibits were entered during the course of these proceedings. In making the findings of fact contained in this decision, the Board has carefully considered all of that oral and documentary evidence, the able submissions of counsel for the respective parties, and such factors as the firmness of the witnesses’ memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour while testifying. We have also considered the inferences which may reasonably be drawn from the totality of the evidence.

16. Retail food distribution has been the mainstay of Dominion’s business since its inception in 1919. As one of the major participants in that industry, its operations have included a retail grocery store chain and a variety of other operating divisions and subsidiaries primarily involved in the processing, distributing and retailing of food.

17. The Union has had a collective bargaining relationship with Dominion for over forty years. In addition to a collective agreement that covered primarily Metropolitan Toronto, the Union at one time had over forty other collective agreements in respect of various Ontario municipalities. Don Collins, the Union's Canadian Director, testified that "through some very hard bargaining" the Union succeeded in obtaining a single collective agreement covering all of Dominion's employees in its (retail food) stores in over seventy municipalities in an area roughly bounded by London, North Bay, Ottawa, and Kingston. By 1981, that agreement (the "Collective Agreement") covered over 10,500 employees in 181 of Dominion's approximately 240 stores in Ontario. Mr. Collins told the Board that the Union favoured, and continues to favour, that large bargaining unit for several reasons, including the job security and broadly-based interchangeability of employees which it provided. He also noted that it permitted bargaining to be done all at once instead of requiring Union officials to be "running around the province spending [their lives] in collective bargaining sessions". He further testified that it enabled greater pressure to be brought to bear in collective bargaining.

18. Dominion's collective bargaining with the Union was carried out by a negotiating committee chaired by Don Blair, who was Dominion's Director of Labour Relations until he retired from that position in 1983. The committee generally included one or more retail vice-presidents, one or more personnel managers, a labour relations assistant, and one or two store managers. A committee of store managers had input into Dominion's bargaining proposals, but no individual store manager was in a position to insist that a particular proposal be tabled as part of Dominion's position at the bargaining table.

19. By early 1982 it had become evident to Dominion's top management that declining sales were eroding its profits and productivity. Larry Gee, who was then a Vice-President of Dominion and Willett, testified that the causes of that decline included the fact that many of Dominion's stores were smaller and less contemporary, attractive, and efficient than those of their major competitors, the fact that Dominion had acquired a "high-priced image", and the fact that Dominion was six or seven years behind Loblaws in opening "super stores". He also told the Board that around a hundred of Dominion's Ontario stores were losing money at that time.

20. An American consulting firm known as Management Horizons was retained by Dominion to analyze the situation and present a strategic plan for consideration by management. In a one-day presentation made to Dominion's President, Vice-Presidents, and Director of Corporate Planning in June of 1982, that firm described the retail food industry as being beset with a number of problems, including aggressive price competition, an excessive number of retail stores, declining population growth, economic recession, and high interest rates. It also noted that "[t]he growing independent competition are operating on much lower expense ratios because they are typically not unionized and have very little head office and district level fixed overhead to allocate." What that firm described as a "strict union contract" was identified as one of the "weaknesses" of Dominion's operations. Franchising and wholesaling were listed in that presentation as two of several "opportunities not fully exploited".

21. Putting together a management team to rectify Dominion's financial problems was postponed until September of 1982 due to vacations and other business demands. In September, Allan Jackson, who was then the President of Dominion, suffered some ill health and was replaced by John Toma later that fall. Thus, it was not until November of 1982 that management took steps to deal with what Mr. Gee described as "an urgent need to close a large number of stores." A list of approximately 110 stores targeted for closure was prepared. One of the stores included in that list was the Dominion store at 1811 Avenue Road. The majority of those stores were selected on the basis that they were unprofitable or expected soon to become unprofitable. Others were selected

on the basis that they were located near a site where a “super store” was going to be opened by Dominion or one of its competitors, or in an isolated market where the closure of other stores would eventually make them non-viable.

22. Dominion had been considering the possibility of entering the franchising field for a number of years. In the 1970's it had attempted to supply some franchised Mac's Milk outlets through its corporate warehouses, but that had not proved to be successful. Although management remained interested in the concept, after that unsuccessful first venture into franchising they recognized that they would need to have a wholesale arm in place in Ontario if they were to be in a position to successfully supply franchised outlets.

23. By November of 1982, Mr. Gee was of the view that Dominion desperately needed to put franchising in place in Ontario in order to make it less vulnerable to market conditions. He was further of the view that the Company needed a wholesale arm in Ontario in order to make franchising viable and to give it the same competitive edge that its competitors (such as the Weston Group (Loblaws) and the Oshawa Group (I.G.A. and Food City)) had in the marketplace.

24. Dominion's only experience in wholesaling was acquired through Willett. In 1975 Dominion purchased sixty percent of the shares of that company. Five years later Willett became a wholly owned subsidiary of Dominion. At that time, Walter Flewelling was appointed as President of Willett. (He remained in that position until May of 1985 when he and others purchased all of the assets of Willett and Dominion in New Brunswick.) Dominion's prime strategy for Willett was to make it the leading and dominant wholesaler in the Maritimes. That goal was achieved during the period from 1975 to 1982 in which Willett went from a single operation in Saint John to a multi-plant operation in the Maritimes. Dominion originally planned for Willett to enter Ontario first in Kitchener and then in Ottawa. However, that plan was reversed when Dominion's operations in the Province of Quebec were sold to Provigo. Prior to that sale, Dominion's stores in Kingston, Cornwall, Ottawa, and other locations in the Ottawa valley had been supplied by Dominion's distribution centres in Montreal. After the sale, those stores continued to be supplied by the Montreal warehouses. However, since those warehouses were no longer owned by Dominion, it became a priority for Willett to find a site and build a wholesaling distribution centre in Ottawa.

25. Willett opened its first Ontario distribution centre in Ottawa in December of 1982. That facility supplied Dominion stores in the Ottawa valley and also supplied various restaurants, hotels, cafeterias, and institutional accounts through its food service division. However, it needed additional business to bring it into a profitable position. Mr. Gee was of the view that such additional business could only be obtained through franchising.

26. Willett opened its second Ontario distribution centre in Kitchener in October of 1983. Unlike its Ottawa counterpart, that facility did not supply any of Dominion's retail food stores because all of the stores in its vicinity were supplied by Dominion's distribution centres in Toronto. It also did not have a food service division. Thus, it was dependent exclusively upon non-aligned independent retailers, an undesirable situation due to the inherent unpredictability of sales volumes.

27. Mr. Gee testified that Dominion's decision to close 110 stores was made independently of the decision to embark on a franchise programme, although he acknowledged that those two decisions “were obviously connected as time went on”. It was his evidence that having irrevocably decided to close 110 stores, Dominion had a number of possible alternatives. It could attempt to transfer stores into non-food uses such as hardware stores, pharmacies, or bingo halls. However, all of the stores were leased rather than owned by Dominion, and some of the leases prohibited a sublease to a non-food use, while others required the consent of the lessor for such a transaction.

Another alternative in some instances was to close the store and leave it vacant, as the closed costs were often less than the operating costs. However, this too was not possible in some circumstances as some of the leases contained covenants which required continued operation of a retail food store on the leased premises. Another option was to sublease to another food retailer (if the head lease permitted this to be done). If such a sublease could be tied to a supply agreement, such an arrangement would enable Dominion to supply food products to the sublessee on a wholesale basis. The final option identified by Mr. Gee in his testimony before the Board was franchising. That option was particularly appealing since, at that time, Dominion still intended to remain as one of the major players in the Canadian retail food industry.

28. Mr. Blair met with Mr. Collins in November of 1982. During that meeting, Mr. Blair advised Mr. Collins that Dominion intended to close a number of its stores and to work out a franchise arrangement. He also indicated that there would be further meetings to discuss the matter with the Union. Mr. Collins met with Mr. Toma in December of 1982 and was given a list of approximately one hundred stores that Dominion had targeted for closure. That list was given to Mr. Collins in confidence, as it had not yet been disclosed to Dominion's Regional Managers.

29. The decision to embark upon a franchising programme through Willett was made in November of 1982. That decision was made by Dominion's President and Vice-Presidents. A Franchise Steering Committee (the "Committee") was struck in November of 1982, under the chairmanship of Mr. Gee. Its other members were Walter Flewelling, the President of Willett; R. E. Acton, Dominion's Vice-President of Marketing; A. M. MacDonald, Dominion's Vice-President of Real Estate and Development; K. R. Parkhill, Dominion's Vice-President of Wholesale Operations; D. M. Luciuk, Dominion's Chief Accountant; P. M. Bourke, Dominion's Director of Computer Services; R. Yaworski, Dominion's Manager of Engineering Services; and Bill Ashton, who served as a facilitator and recording secretary for the Committee. Prior to assuming that role, Mr. Ashton had headed up the real estate and development function within Min-a-Mart, another Dominion subsidiary. However, since Min-a-Mart was also losing money, Dominion had decided to freeze it from any future development and had tentatively targeted it for divestiture. Since that decision had made Mr. Ashton's position redundant, he was reassigned to facilitate and co-ordinate the activities of the Committee.

30. During December of 1982 and the first two months of 1983, the Committee originated and developed the Mr. Grocer franchise concept which offered, within the framework of a franchise agreement, a comprehensive merchandising, advertising, supply, and service package enabling franchisees to operate under a common name and logo in stores with distinctive green and white colouration. The Committee met on December 1, 9, and 16, 1982. A further meeting was scheduled for December 20, 1982. One of the items on the agenda for that meeting was the "Union agreement". However, that meeting was cancelled and the Committee did not discuss that item.

31. Since management was of the view that they would be unable to make a success of the Mr. Grocer franchise programme with the Collective Agreement in place, attempts were made to obtain a modified agreement with the Union in order to make the Mr. Grocer franchise a "saleable package" (in the words of Mr. Gee). In earlier years the Union had agreed to a number of mid-term collective agreement amendments, including some pertaining to Dominion's "Thrift" stores and others pertaining to Dominion's "Best for Less" stores. Mr. Gee, Mr. Blair, Barry Hagan (another Vice-President of Dominion), and Mr. Ashton met with Mr. Collins, Bert Scott (Assistant to the Union's Canadian Director), and Roy Higson (the Local Director of Local 414) in early January of 1983. At that meeting Mr. Ashton described the Mr. Grocer concept that had been developed by Dominion and talked about the layout of the new operation and the type of stores that were planned. The Union was also advised at that meeting that the Company was converting a

Dominion store in Markham into a Mr. Grocer store to serve as a flagship for the Mr. Grocer programme. The list of stores targeted for closure was reviewed at that meeting and management, primarily through Mr. Blair, indicated that if the franchise programme was to be successful, the Company would require some relief under the Collective Agreement. Mr. Collins suggested that Mr. Blair put together a document that would show the “bottom line” of what the Company needed. In making that suggestion, Mr. Collins emphasized that the Union would be looking for a comprehensive collective agreement and not an agreement pertaining to a single store.

32. The Company’s proposal, in the form of a draft collective agreement, was forwarded to Mr. Collins by Mr. Blair. It contained a number of proposed amendments, including a scope clause and seniority rights confined to a single store, an increase in the length of the probationary period from twenty-two to sixty days of work for full-time employees, and forty-four to sixty days for part-time employees, an increase in the “normal work week for all regular full-time store employees” from thirty-seven to forty hours, a twenty five percent reduction in overtime pay for overtime worked on Sundays and holidays, the elimination of one of the employees’ ten paid holidays, a reduction in vacation entitlement for some employees, the elimination of some job classifications, and substantial wage cuts for the remaining classifications. For example, the start rate of a Clerk “A” was reduced from \$247 to \$175 per week (\$6.68 per hour to \$4.375), the three-month rate increase (formerly an increase to \$7.05 an hour) was eliminated, the six-month rate was reduced from \$7.43 to \$4.50, and a new twelve-month rate (of \$4.625) was introduced. Very substantial reductions were also proposed for Clerks “B” and Meat Cutters (whose starting rate of \$11.49 would be reduced by fifty percent to \$5.75).

33. When the Union officials next met with management, Mr. Collins, who was of the view that the Company’s proposals “basically gutted the Collective Agreement”, told management that there were so many changes from the existing Collective Agreement that it would be impossible to sell the Company’s proposal to the membership. When Mr. Blair asked if the Union would be prepared to come back with another document, Mr. Collins reminded him that he had asked for the Company’s “bottom line” and had specifically indicated that the Union was not going to be dealing with the Company on a store-by-store basis. Although there were some further discussions, the Company and the Union were unable to reach an accord.

34. Mr. Gee told the Board that during the period from November of 1982 to June of 1983 no one brought to his attention the possibility of section 1(4) of the Act being applied to a franchising situation. It was his understanding that the successor rights provisions of the Act would entail recognition of the Union only on a store-by-store basis. The source of Mr. Gee’s information in that regard was Mr. Ashton, whom he understood had in turn obtained that information from Mr. Blair. Prior to assuming his real estate and development functions in respect of Min-a-Mart, Mr. Ashton had been a Labour Relations Manager with Dominion for a number of years. Although Mr. Gee testified that Mr. Ashton was never formally mandated by the Committee to stay in touch with labour relations considerations pertaining to the Mr. Grocer franchising programme, he conceded in cross-examination that Mr. Ashton “may have assumed that position because of his background”. Mr. Gee also testified that decertification was “never a consideration” in the decision to embark upon franchising. Indeed, it was his evidence that decertification was “never even discussed” by the corporate officers who made that decision.

35. On December 23, 1982 Mr. Gee assigned Mr. Ashton the task of developing a method to expedite the preparation of “pro formas” for 69 Dominion stores which were being considered for franchising. The term “pro forma” was used by Dominion and Willett to describe a written five-year forecast of estimated sales, margins, ECR’s (earned credit rebates that would be obtained by Mr. Grocer through volume purchases and passed along, in whole or in part, to franchisees),

expenses, and profits. He also asked Mr. Ashton to provide him with recommendations concerning which of those stores should be the first five selected for franchising. Arrangements were also made to hire Ross Bletsoe as Willett's Director of Franchise Operations. Prior to being hired by Willett, Mr. Bletsoe was employed by the Oshawa Group as Director of Retail Operations for I.G.A. Stores. He was initially approached by a recruitment firm in late October or early November of 1982. Following discussions concerning his background and expertise, Mr. Bletsoe commenced employment with Willett in early February of 1983.

36. The pro formas prepared by Mr. Ashton, and subsequently provided to some if not all of the prospective franchisees, estimated wage costs at 10.5% in the first year of the franchise, with a reduction to 8% in the second year of the franchise. Mr. Gee suggested in his evidence that statistics publicly available through various trade associations suggested that independent retail food stores operated with a labour cost around 8%. He further testified that the anticipated 2.5% reduction would be obtained by the franchisee negotiating a collective agreement more favourable to his own operation and obtaining increased productivity and commitment from his staff through what Mr. Gee described as the "bond" which develops between an employer and an employee when the employee knows that the store in which he is employed is his only source of income. Mr. Bletsoe offered a similar explanation, but added that it was anticipated that in the first year both the franchisee and his staff might be less efficient than in subsequent years, that the franchisee and in all likelihood his family would be involved in the business working more hours for little or no pay in the early years, and that the franchisee would expand the hours of operation. He also stated that when the Collective Agreement expired in June of 1984, Willett fully expected that the franchisee would be able to negotiate reductions in the areas of salary and work restrictions. However, a "Mr. Grocer Overview" appended to a "private and confidential" memorandum dated April 25, 1983 that was prepared by Mr. Ashton in respect of Willett's Kitchener warehouse clearly indicates that the anticipated wage and benefit reduction of 2.5% was in fact premised on "decertification". (Although the word "decertification" does not appear in the *Labour Relations Act*, that term is commonly used by employers, union officials, labour relations practitioners, and other members of the labour relations community, to denote termination of bargaining rights under the *Labour Relations Act*. It was used in that sense throughout the evidence and submissions of counsel and, accordingly, has been adopted by the Board in this decision). That "overview" reads in part as follows under the heading "PROFIT CENTRE":

- (A) *Franchise* - Pro formas show a 2% profit before tax, after a manager's salary of 1% and costs associated with debt servicing 75% of capital required (inventory). To achieve the 2% profit, Mr. Grocer is required initially to assume some/all occupancy costs. However, all stores should bear all occupancy costs and develop a 2% profit, after the location is decertified (union), when the wages and benefits drop from a current 11.5% to 9.0%.

That memo was distributed to D. MacTavish, Willett's Vice-President of Finance; K. R. Parkhill, Dominion's Vice-President of Wholesale Operations; W. D. Roberts, Dominion's Director of Internal Audit; R. G. Fry, Dominion's Vice-President of Personnel; and J. Svenson, Dominion's Industrial Engineer. It was also "carbon copied" to W. B. Flewelling, the President of Willett; R. Garnett, an Office Manager who reported to Mr. MacTavish; and Mr. Gee. Mr. Gee told the Board that he did not remember seeing that document. None of the other members of management who received a copy of that document was called to testify in these proceedings, nor was Mr. Ashton.

37. That decertification of some if not all of the stores was part of the Mr. Grocer game plan is also evident from the written Mr. Grocer budget "assumptions" that Mr. Ashton prepared in March or April of 1983. One of the assumptions included on that typewritten sheet is:

D.S.L. CONVERSION SUBSIDY: Anticipated subsidy received from Dominion Stores as incentive for Willett to assume losing [sic] locations calculated as \$10,000 per quarter, per unit, until unit decertified.

The preparation of that budget was a co-ordinated effort between Mr. Bletsoe and Mr. Ashton. They conferred with one another regarding capital requirements, expenses, and other factors pertinent to its preparation. The anticipated "conversion subsidy", which was to be a reduction in rental occupancy cost in order for Willett to take an assignment of lease on some locations, never in fact materialized. Thus, Mr. Bletsoe described it as "wishful thinking on Willett's part that Dominion would give Willett a break in the rent on a particular location".

38. Having fulfilled its mandate by bringing on stream the Mr. Grocer concept, name, logo, and philosophy, the Committee was disbanded just prior to the opening of the first Mr. Grocer Store on February 23, 1983 in Markham. That store was operated as a "corporate store" covered by the "province-wide" bargaining unit in the Collective Agreement. It served as a prototype store by means of which prospective franchisees could gain an appreciation for the Mr. Grocer signage, decor, and layout.

39. The Mr. Grocer operation became a division of Willett on February 27, 1983. It was Mr. Bletsoe's evidence that he and Mr. Ashton were the two key employees running the Mr. Grocer operation of Willett Foods prior to the arrival of Milford Sorensen, who in May of 1983 was appointed Vice-President of Willett responsible for all of its Ontario operations. Although Mr. Gee took issue with that evidence, we are satisfied that Mr. Bletsoe's assessment of the situation is more accurate than that of Mr. Gee, whose testimony is replete with attempts to minimize the importance of Mr. Ashton and the role which Mr. Ashton played in respect of the Mr. Grocer franchise programme. For example, he characterized Mr. Ashton as a "runner" and a "gofer"; in commenting on the organizational chart dated April 25, 1983 on which Mr. Ashton's position is titled "Director, Administration", Mr. Gee referred to Mr. Ashton as an "administrative assistant". Notwithstanding Mr. Gee's attempts to minimize the significance of Mr. Ashton's functions, it is clear from the evidence as a whole that Mr. Ashton played a major role in the development and implementation of the franchise programme.

40. Various persons were transferred to the Mr. Grocer division of Willett in the spring of 1983. R. J. Morris became Mr. Grocer's Merchandising Co-ordinator and R. B. Bell became District Manager. Mr. Bletsoe also added Retail Counsellor Jim Hill, and Franchising Manager J. C. Prittie. A Marketing Manager named George Lea became a member of Mr. Bletsoe's staff later that year. With the exception of Mr. Lea, who had been an employee of the Oshawa Group before joining Willett, all of those persons were former employees of Dominion or, in the case of Mr. Prittie, Min-a-Mart, a Dominion subsidiary.

41. When he began to work for Willett in February of 1983, Mr. Bletsoe discussed some of the labour relations consequences of the Mr. Grocer programme with Messrs. Ashton, Blair, Gee, and Flewelling. It was his evidence that Mr. Blair "explained successor rights" to him and informed him in general of the Collective Agreement. He further testified that to the best of his recollection, Mr. Blair did not discuss section 1(4) of the Act with him. Mr. Ashton also discussed the Collective Agreement and successor rights with Mr. Bletsoe, as well as decertification and the possibility of franchisees attempting to "strike their own deal" with the Union. Mr. Bletsoe also discussed successor rights with Mr. Gee sometime in February. From those discussions, it was Mr. Bletsoe's understanding that each franchisee would be bound by the Collective Agreement but would subsequently have an opportunity to renegotiate it. Mr. Bletsoe testified during examination in chief that he personally had "no expectation whatsoever" that the Union would be decertified at any of the Mr. Grocer stores. However, while maintaining that decertification of every franchise

location would be a long shot, he acknowledged in cross-examination that he was aware that decertification of the stores was a more likely possibility if bargaining rights were held on a store-by-store basis rather than on the nearly province-wide basis that existed under the Collective Agreement vis-a-vis Dominion stores. He also stated that this possibility was discussed with Messrs. Ashton, Flewelling, Sorensen, Morris, and Prittie. Mr. Bletsoe also discussed decertification with some of the prospective franchisees, "told them what the law was relative to decertification as far as the percentage required to have a decertification", and suggested that they seek outside labour relations advice. It was his evidence that he would not discuss the matter further with prospective franchisees because he understood from reading a labour relations booklet that discussion of decertification by a management official is not considered proper. While he resisted Union counsel's suggestion that decertification was an important aspect of the financial budgetary planning for the Mr. Grocer franchise programme, Mr. Bletsoe conceded that it "was a consideration" and that it "was contemplated in some stores". During cross-examination on that matter he was also asked (by Union counsel), "May I suggest to you that one of the significant and obvious and major advantages to setting up the franchise scheme was that the Union's bargaining rights as you saw it at best would be restricted to one store, on a store-by-store basis that is, and at worst would ultimately be eliminated?" Mr. Bletsoe's reply was, "That is a fair assessment, yes." He also gave a similar response to the following question posed by Union counsel: "I'm not going to ask you about matters before February of 1983 because that wouldn't be fair, but based on your understanding of the corporate belief, if I can call it that, in the spring of 1983, the senior management group of Willett and Dominion, I suggest to you that when you pressed on with the franchise scheme that one of the obvious ways of making those stores more profitable if they had not been before was to either reduce the labour cost burden or eliminate the trade union from the scene? That was the most obvious target in making the stores more profitable or at the least it was a very obvious target, isn't that fair?"

42. Thus, it is clear from the evidence as a whole that members of management within the Willett organization contemplated that the Union would be decertified in at least some of the franchised stores and implemented the franchise programme on that basis. As noted above, Mr. Ashton prepared pro formas, including the ones pertaining to the 1811 Avenue Road store, on the basis of a 2.5% reduction in wages and benefits in the second year of the franchise, with that reduction being premised on decertification. Mr. Ashton's budget "assumptions" (as quoted above) provide further confirmation of his views in that regard. Moreover, it is evident that Mr. Prettie, whose primary role as Franchise Manager was that of screening potential franchisees, also contemplated decertification and counselled prospective franchisees accordingly. Indeed, it was Mr. Bletsoe's evidence that he admonished Mr. Prettie for "overselling" the possibility of decertification.

43. As Willett's Director of Franchising, Mr. Bletsoe became responsible for both the franchising of the Mr. Grocer stores and for their day-to-day retail operations, including merchandising, advertising, store supervision, and ensuring receipt of payments from franchisees. He began to interview prospective franchisees the day after he commenced employment with Willett, and also played a major role in providing input to Willett's lawyer, Coulson Mills, concerning the creation of a "standard" Mr. Grocer franchise agreement. In doing so, he "borrowed heavily on the franchise agreement that was then in use at I.G.A. Stores."

44. One of the prospective franchisees interviewed by Mr. Bletsoe in February of 1983 was Roland Ferencz. Mr. Ferencz had been a full-time employee of Dominion since 1954. He started as a grocery clerk and through a series of promotions became a grocery manager, general merchandising manager, assistant store manager, and then a store manager. He managed the Dominion Store at 1811 Avenue Road from 1972 to 1979. While managing that store, he also had a furniture

store called Royale Holiday Sales. However, that business was not a financial success. In November of 1979, Mr. Ferencz left the 1811 Avenue Road store to become the manager of the Dominion store at 550 Eglinton Avenue West ("550 Eglinton"). Mr. Ferencz first learned about the Mr. Grocer franchise programme through a newspaper advertisement in February of 1983. In response to that ad, he telephoned Mr. Bletsoe around February 24, 1983 and arranged to meet with him after working hours at the Dominion/Willett offices at 605 Rogers Road, Toronto. During that initial meeting, Mr. Bletsoe interviewed Mr. Ferencz concerning his financial resources and managerial background. Mr. Ferencz, in turn, asked Mr. Bletsoe a number of questions about the franchise programme. Mr. Bletsoe was unable to answer some of Mr. Ferencz's specific questions concerning the Mr. Grocer operation since he had not yet designed some parts of the programme. The meeting ended with Mr. Bletsoe asking Mr. Ferencz to contact him in two or three weeks to further discuss the possibility of a franchise.

45. Approximately two weeks later Mr. Ferencz telephoned Mr. Bletsoe and arranged to meet with him again after working hours at 605 Rogers Road. Mr. Ashton, who Mr. Ferencz knew as a "personnel person", was also present at that second meeting. During that meeting, Mr. Bletsoe and Mr. Ashton asked Mr. Ferencz some further questions concerning his financial position and managerial background. They also provided him with a pro forma concerning the 1811 Avenue Road store which he had previously managed for Dominion. That location was selected by Messrs. Bletsoe and Ashton on the basis of Mr. Ferencz's familiarity with it and the proximity of his residence to it. Mr. Ferencz had no part in the selection of that location. Indeed, he was surprised when they gave him the pro forma for that store, as the pro forma provided the first indication of the store that they had in mind for him. It was his evidence that he "raised the issue of maybe if there were any other stores around, but they stuck with 1811 Avenue Road." After briefly discussing the pro forma with him, Messrs. Bletsoe and Ashton invited him to take it home for analysis and then to get back to them with his thoughts on it.

46. That pro forma estimated that total income for the first year of the franchise would be \$774,899, which represented 22.93% of estimated sales of \$3,380,000. Total expenses for that year were estimated at \$708,138, of which estimated wages and benefits of \$354,900 constituted 10.5%. The pro forma indicated that no rent would be required to be paid for the premises or for leasing equipment (from Willett) during the first year. However, in the second year rent of \$15,501 and an equipment lease expense of \$49,000 were included in the pro forma, which estimated that in the second year wages and benefits would fall to \$286,624, i.e., 8% of estimated sales. Wages and benefits continued to be estimated at the 8% level in the third, fourth, and fifth years.

47. At a third meeting held at 605 Rogers Road, Messrs. Bletsoe and Ashton provided Mr. Ferencz with a second pro forma. On that document, realty tax for the first year is estimated at \$19,400 instead of \$9,250 as was the case on the first pro forma. (Mr. Ferencz expressed the view that the \$9,250 was inaccurate as he knew that it would be higher.) However, the estimated first year profit (after tax) remained at 1.48%, since the estimated franchisee ECR was increased from \$155,480 to \$165,620. The only changes in the second year were a \$9,000 increase in rent (from \$15,501 to \$24,501) and a \$6,000 decrease in equipment rental (from \$49,000 to \$43,000), with a consequent \$3,000 reduction in estimated profit after tax. The estimated reduction in wages and benefits from 10.5% of sales in the first year to 8% of sales in each of the ensuing four years remained unchanged. Mr. Ferencz signed the following disclaimer that appeared on the back of the pro forma:

MR. GROCER does not represent or warrant that any prospective Dealer can expect to attain the sales volume, margins or profit shown on the pro forma statement on the reverse side hereof, or that he will have a profitable operation at the location being considered.

Rather, the prospective Dealer is cautioned that he cannot expect to have similar results unless he can attain similar sales and margins and maintain his cost of labour and other operation expenses within similar limits.

The product categories shown on the pro forma statement are based on the product mix of the marketing plan for the location being considered. The average margin for each category is based on an assumed product mix within each category, and is calculated on the difference between cost and suggested selling price in the Company's Order Guide and Selling Price Book, and total sales volume of the location and the distribution of such sales between the product categories are assumed for the purpose of illustrating the method of making such calculations.

The location being considered is a new store which has not previously been operated as a Mr. Grocer. Actual sales and earnings are affected by the location and many other factors including the Dealer's own efforts and ability, as well as factors over which he has no control.

The undersigned prospective Dealer agrees to rely upon his own estimates, calculations and projections of actual or potential sales volume, margins, operating expense and profit and not on any oral or written representations, information or other material made or given to him by the Company.

Mr. Bletsoe and Mr. Ashton made it clear to Mr. Ferencz that if he took a franchise it would be his responsibility, and that if it did not succeed all of the losses would be his.

48. After reviewing that second pro forma, Mr. Ferencz, who had discussed the matter with his family and decided that he wished to obtain a Mr. Grocer franchise, wrote to Messrs. Bletsoe and Ashton on April 11, 1983 in order to raise a number of questions and suggestions. He suggested that estimated sales should be revised from \$65,000 to \$60,000 weekly for the first year of operation; that there be no rent paid for the premises or for leasing equipment during the first two years, with 33%, 66%, and 100% of the estimated rent and equipment lease charges being payable in the third, fourth, and fifth years, respectively; that realty tax be held at 57% for two years, 66% for the third year, 76% for the fourth year, and 86% for the fifth year; and that the \$5,000 utilities deposit be averted by having Dominion continue to be billed for utilities. He further requested that a decision be made that week concerning the franchise as he had been promoted by Dominion from his position as a store manager to a head office position as pricing co-ordinator for Ontario. In addition to questions contained in the body of that letter concerning ECR's, special promotions, and insurance requirements, Mr. Ferencz appended a list of further questions and suggestions, including the following:

• • • •

12. Request meeting to find out my rights regarding the union and how to decertify the union agreement when the present contract ends.
13. Must the wage scale remain the same?

Mr. Ferencz told the Board that he raised point 12 because he had nine or ten family members available to work for him and felt that it was not necessary to have a union since it was to be a family business.

49. When he met with Mr. Ferencz to discuss the matters contained in his letter, Mr. Bletsoe denied Mr. Ferencz's request for reductions in rent, equipment lease costs, and realty tax. He also rejected Mr. Ferencz's proposal concerning utility payments (but advised him that he could probably obtain a letter of credit from a bank that would eliminate the necessity of a utility deposit). With respect to questions 12 and 13, Mr. Bletsoe told Mr. Ferencz that he had no intention of discussing those matters with him and suggested that he seek outside counsel or labour relations advice on those subjects.

50. Mr. Ferencz was represented in his subsequent dealings with Willett by Anthony Crossley, a commercial lawyer who is a partner in the Stapells & Sewell law firm. Mr. Ferencz telephoned Mr. Crossley in mid April of 1983 and arranged to meet with him about a week later. At that initial meeting, Mr. Ferencz explained his plans and provided Mr. Crossley with the draft franchise agreement, sublease, and general security agreement that he had received from Willett. Mr. Crossley arranged a meeting with Grant Beasley, a partner in the chartered accounting firm of Clarkson, Gordon. During that meeting, it was decided that RPKC would be incorporated to provide a corporate vehicle through which to enter into the contemplated sublease and franchise agreement. RPKC's Articles of Incorporation became effective on May 12, 1983. Mr. Ferencz is the President of RPKC and holds 51% of its shares. The remaining 49% are held by Mr. Ferencz's wife Pamela, who is also the Secretary of RPKC.

51. After his initial meeting with Mr. Ferencz, Mr. Crossley proceeded to review the draft documents and made marginal notes concerning areas in which clarification or revisions might be desirable. At Mr. Crossley's request, Mr. Ferencz also reviewed those documents and wrote down a number of matters that he wished to pursue, including his desire to have the term of the franchise agreement changed from one year to five years, to have an option granted under which the five year sublease could be renewed for a further term of five years, to have the interest on arrears reduced from 6% above the prime rate to no more than 2% above that rate, to have the royalties payable to Willett reduced, to have the period during which no rent or equipment lease cost would be payable extended from twelve months to twenty-four months, to have all rather than just some of the ECR's passed on by Willett to its franchisees on a pro rata basis, and to have the franchise agreement revised to make it clear that no royalties would be payable to Willett in respect of sales of bone, fat, and cardboard salvage.

52. On May 12, 1983, Mr. Crossley met with Mr. Ferencz to discuss the matters which they had identified through their respective reviews of the draft documents. Later that same day they were joined by Mr. Beasley for a meeting with Messrs. Bletsoe and Ashton. After Mr. Beasley had discussed the pro formas and the financial arrangements, Mr. Crossley went through the marginal notes that he had made on the draft documents. Willett subsequently provided Mr. Crossley with redrafts of the franchise agreement, the sublease, and the general security agreement. Although Willett was not prepared to accede to most of the requested changes, some revisions were made including the exclusion of "renderings and cardboard salvage" from the calculation of royalties, and the granting of an option to extend the franchise agreement for a second year (with a possibility of three further one-year extensions) on the basis of the advertising fee and royalty provisions that were being offered to other existing or prospective franchisees at the time of the extension. The draft sublease was also amended to provide for a similar renewal option and a right of first refusal (as detailed in paragraph 18.1 of Exhibit 35). There were also some changes made in the general security agreement to further clarify the respective rights of the parties.

53. Legal counsel from Dominion accompanied Messrs. Bletsoe, Ashton, Ferencz, and Beasley when they met with representatives of the Toronto-Dominion Bank to discuss financing arrangements. In explaining the presence of Dominion's legal counsel at that meeting, Mr. Ferencz told the Board, "The reason he was there was to strengthen Willett Foods in regard to backing me. The Toronto Dominion Bank didn't know who Willett Foods was." Thus, with the assistance of Willett and Dominion, Mr. Ferencz was placed in a position where he could, if necessary, borrow funds from the Toronto Dominion Bank at an interest rate approximately half a percent above prime. However, he did not find it necessary to avail himself of that opportunity, which was also offered to other franchisees pursuant to an arrangement arrived at through discussions between the Toronto-Dominion Bank and Willett, with the assistance of Dominion.

54. Willett also agreed to provide RPKC with \$50,000 in financing pursuant to a promissory note under which no interest would be payable on any principal repaid on or before the 190th day, interest at the rate of 6% per annum would be payable on any principal repaid after the 190th day but before the 366th day, and interest at the rate of 12% per annum would be payable on any principal repaid on or after the 366th day. Willett also provided RPKC with a "walk letter" which, in the event that RPKC elected to terminate the franchise agreement, permitted RPKC to terminate its lease of equipment and sublease of 1811 Avenue Road at the same time. By "Ryder 'A'" to the lease, Willett agreed to limit RPKC's potential liability for repair cost in respect of fixtures and equipment that were being leased to it by Willett.

55. After deciding in principle that he was going to enter into a Mr. Grocer franchise agreement, Mr. Ferencz spoke with Mr. Ashton concerning the matter of giving appropriate notice to Dominion. Mr. Ashton advised Mr. Ferencz that he would speak to Dominion on his behalf. As a result, Mr. Ashton arranged for Mr. Ferencz to be transferred from his position as pricing co-ordinator for Dominion to "Mr. Grocer responsibilities". To confirm those arrangements, Mr. Ashton sent the following memo (Exhibit 12) to Mr. Ferencz on May 13, 1983, with copies to Messrs. Gee, Sorensen, and Bletsoe, and to two other members of management:

SUBJECT: TRAINING SCHEDULE

The following will confirm our discussions.

Effective Monday, May 16th, 1983, you will be transferred to Mr. Grocer responsibilities. Your schedule will be:

Monday, May 16th	— Markham
Tuesday, May 17th	— J. Morris
Wednesday, May 18th	— A.M. — Weston Rd. (Bakery-Deli)
	— P.M. — Competition Checks
Thursday, May 19th	— J. Morris
Friday, May 20	— Markham
Tuesday, May 24th	— A.M. — Weston Rd. (Bakery-Deli)
	— P.M. — Competition Checks
Wednesday, May 25th	— Markham
Thursday, May 26th	— J. Morris
Friday, May 27th	— Personal Business

Commencing Saturday, May 28th, you will be on vacation until Saturday, July 9th. Dominion will accept your resignation on July 9th to allow you to go into business for yourself.

It is our understanding that you will, in fact, take a vacation from May 27th to June 18th. We will schedule additional training for you from June 20th to July 2nd. During that time, you will also confirm your staff and formalize administration details. Commencing July 5th, you will be required, at the store, to prepare for the July 20th opening.

Thus, although Mr. Ferencz had no continuing responsibilities with Dominion from May 16, 1983 onward, Dominion continued to pay his salary and benefits until July 9, 1983.

56. On or about May 18, 1983, Mr. Ferencz met with Mr. Blair, who had left the employ of Dominion and established a labour relations consulting firm. Also present at that meeting were Gerald Penrose and Terry Nichol, two other prospective franchisees. Mr. Nichol had contacted Mr. Ferencz to advise him that he and Mr. Penrose were going to see Mr. Blair concerning the Union contract and "correct procedures", and to invite Mr. Ferencz to accompany them and share the cost of the consultation. Mr. Ferencz knew Mr. Nichol because he was employed in one of the Dominion stores in the same district as the Eglinton Avenue store managed by Mr. Ferencz. He had not met Mr. Penrose prior to that meeting; all that Mr. Ferencz knew about him was that he

was a retired employee of Dominion. Mr. Ferencz also knew that Mr. Blair had previously been employed by Dominion in labour relations. It was Mr. Ferencz's evidence that Mr. Blair advised him that the Union had successor rights which Mr. Ferencz would have to recognize, and further advised him that he would be bound by the Collective Agreement and should honour it to the best of his ability. Mr. Ferencz's evidence concerning that meeting was rather vague, and was not supplemented by any evidence from Mr. Blair or the other individuals present at that meeting. However, in view of the fact that Mr. Bletsoe had declined to answer Mr. Ferencz's question about his "rights regarding the union and how to decertify the union agreement when the present contract ends", and had suggested that he seek outside counsel or labour relations advice on those subjects, it is reasonable to infer that decertification was one of the subjects discussed at that meeting. In this regard, we note that there is nothing in the evidence to suggest that Mr. Ferencz lost interest in that matter.

57. During the period leading up to the signing of the franchise documents, Mr. Ferencz asked Mr. Bletsoe about payment of labour relations fees. Mr. Bletsoe, who anticipated that there might be proceedings before the Board, assured Mr. Ferencz that Willett would assist him if his legal fees became burdensome. (A similar assurance was given to Messrs. Penrose and Nichol.) That assurance to Mr. Ferencz was renewed in the spring of 1985 when the instant proceedings were imminent; at that time, Mr. Ferencz was advised that Willett would absorb the cost of these proceedings. However, no such undertaking was given with respect to legal (or accounting) fees concerning the negotiation of the franchise agreement and related documentation. All of Mr. Crossley's and Mr. Beasley's professional fees were paid by RPKC without any financial assistance from Willett.

58. Following further meetings between Mr. Crossley and Willett's solicitor, Mr. Crossley advised Mr. Ferencz on May 30, 1983 that Willett had not moved concerning his proposal that the franchise agreement have a term of more than one year. They then met again with Messrs. Bletsoe and Ashton and told them that Mr. Ferencz would walk away from the deal if he could not obtain a two-year term. After further discussions, a two-year term was ultimately agreed upon later that day and the documentation was executed by Willett, RPKC, and by Mr. and Mrs. Ferencz as guarantors. (Since those documents contained some last minute changes that were penned in just before they were signed, clean copies were subsequently prepared and executed.) By signing as guarantors, Mr. and Mrs. Ferencz stood to lose their home and their other assets if the venture failed. Although Mr. Ferencz recognized that he "could lose everything" if the franchise was not successful, he testified that he was willing to take that gamble in order to try "owning [his] own business".

59. Although negotiations had also been taking place with other prospective franchisees, RPKC's franchise agreement was the first one to be signed and came to be used as a precedent for subsequent franchise agreements that were executed by Willett. The obligations of Willett (referred to in the franchise agreement as "Mr. Grocer") are described as follows in paragraph 2.1 of the franchise agreement (which refers to RPKC as the "Dealer"):

Mr. Grocer agrees to advise and assist the Dealer in operating the business of a retail food supermarket in the Premises, pursuant to a marketing plan or system prescribed by Mr. Grocer for the distribution, through independent franchised dealers, of a multiplicity of products obtained by Mr. Grocer from competing sources of supply and a multiplicity of suppliers, no one product being inordinately dominant in the business. Mr. Grocer will provide operating manuals to prescribe the marketing plan or system aforesaid and explain their use to the Dealer, and advise and assist the Dealer in:

- (a) setting up a bookkeeping system and procedures;

- (b) establishing inventory and quality controls;
- (c) planning point of sale and neighbourhood advertising and promotional programs; and
- (d) analyzing the efficacy of same from time to time;

Provided that the Dealer provides an adequate flow of relevant financial information to Mr. Grocer, as requested by Mr. Grocer, Mr. Grocer will analyze the Dealer's operations from time to time and compare the Dealer's operating results with those of Mr. Grocer's other franchised dealers and from such analysis and comparison advise and offer assistance to the Dealer and such other of Mr. Grocer's franchised dealers with respect, where possible, to reducing their costs, and improving their sales, margins and profits for their mutual benefit.

The franchise agreement gives RPKC the right to terminate that agreement, at its option, upon thirty days prior written notice to Mr. Grocer. If RPKC were to exercise that option, it could walk away from the premises (pursuant to the aforementioned "walk letter"), or remain in the premises for the balance of the five-year sublease and operate as an independent grocery store or as a franchisee of another franchisor, such as I.G.A. or Red & White Stores. However, under the terms of its sublease, if it exercised that option it would lose its "right of first refusal" (under paragraph 18 of the sublease) in respect of a renewal of that sublease for a further term of at least five years.

60. RPKC's financial obligations under the franchise agreement include royalty payments of 3.85% of its net sales (as defined in paragraph 1.8) and advertising fee payments of .75% of its net sales. RPKC is also obligated to pay Willett for the products which it supplies to RPKC and for the products which RPKC receives from authorized direct suppliers. RPKC also pays Willett rent for the premises, fixtures, and equipment which it has leased or subleased from Willett.

61. Although some employees were able to continue to work for Dominion by exercising seniority rights to transfer to stores that remained open, the aforementioned store closings resulted in the layoff of a substantial number of employees. Neither Dominion nor Willett took any steps whatsoever to direct or encourage franchisees to recall or hire those laid off employees. It was Mr. Ferencz's uncontradicted evidence that in his discussions with Messrs. Bletsoe and Ashton, he was never told that he should hire Dominion employees who were laid off as a result of the store closings. Indeed, it is clear from the totality of the evidence that Willett, through Messrs. Bletsoe and Ashton, intentionally left Mr. Ferencz with the impression that he would be at liberty to hire whomever he wished to staff the store, and that he would not be obligated to recall or hire laid off Dominion employees. Although he was afforded an opportunity to do so during cross-examination by counsel for the Union, Mr. Gee was unable to provide any explanation for why Dominion (or Willett) took no responsibility in that area.

62. RPKC was given possession of the 1811 Avenue Road store on July 6, 1983. There were no employees working at the store at that time as it had been closed by Dominion sometime earlier.

63. Appendix "F" of the Collective Agreement lists seniority areas. Area 1(A) consists of Toronto West and Brampton. Area 1(B) consists of Toronto East, Markham, Pickering, New Market, and Richmond Hill. That appendix also specifies that Metropolitan Toronto will be considered two separate municipalities based on the division of the area between the Toronto West District and the Toronto East District. The 1811 Avenue Road Store is in the Toronto West District. When it was closed by Dominion, all of the employees who were eligible to bump into other stores under the terms of the Collective Agreement did so pursuant to Article 2 of the Collective Agreement which provides, in part, as follows:

2.08 In matters of staff reductions, reduction of a full-time employee to a part-time employee as

provided for in clause 31.02, and recall from layoff, the principle of seniority shall be recognized by the Company, provided the senior employee has the ability and qualifications to do the job in a competent manner. Where staff reductions result in demotion and/or layoffs and in matters of recall, the procedure set out below will be followed.

(a) Probationary employees in the surplus classifications, will be terminated first, and in reverse order of date of hire. If previously employed on a part-time basis, the employee will have the option of returning to his former part-time position; his part-time starting date will be restored and his name will be reinstated on the list of part-time employees desiring full-time employment at his original application date.

(b) Employees not classified by volume (Clerk "A", Clerk "B", Meat Cutters, Journeyman Bakers, Store Porters, Decorators, Chief Clerks) provided they are able and available to perform the job in a competent manner and do not bump an employee with greater seniority will, as set out in (d) below:

- (i) Bump the most junior employee in their classification.
- (ii) If the employee chooses not to bump the junior employee in his classification, or is in fact the most junior employee in his classification; then he will have the right, as set out in (d) below, to bump the most junior employee in a lower classification provided he is able and available to perform the job in a competent manner. If the employee chooses not to bump, or is in fact the most junior employee, then he will be laid off as per Article 31 with recall rights as per Article 2.05(c) and such employee could exercise his option under Article 31.02 to work on a part-time basis.

(c) Employees classified by volume will bump the most junior employee in their classification in the five (5) stores or departments with the closest volume to the store or department being closed in the municipality or the sub-seniority area. Seniority for the purpose of bumping employees classified by volume, will be based on length of continuous employment in the classification. The Grocery Manager, Produce Manager, Meat Manager or Bakery Manager to be bumped would bump the most Junior Chief Clerk in that department as set out in (d) below.

If any employee bumped as set out above, chooses not to accept the position classified by volume available to him, then depending upon his qualifications to perform the job in a competent manner, he would bump the most junior employee as set out in (d) below in one of the following classifications: Chief Clerk, Meat Cutter, Journeyman Baker, Clerk A, Clerk B, Store Porter.

A General Merchandise Department Manager, Head Cashier, Bookkeeper, Deli Manager, or Deli Cook to be bumped would bump the most junior employee in their previous job classification as set out in (d) below provided they are able and available to perform the work in a competent manner.

(d)(i) In the case of multi unit municipalities the senior employee laid off or demoted shall in accordance with 2.08(b) or (c) bump the junior employee in his municipality. The employee so bumped shall then in accordance with 2.08(b) or (c) bump the most junior employee in his sub-seniority area as outlined in Appendix F. The employee so bumped shall then in accordance with 2.08(b) or (c) bump the most junior employee in his overall seniority area as outlined in Appendix F.

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Article 2 also requires the Company to recall by seniority. Article 2.08(e) provides:

When a vacancy occurs that would create a recall, the Company will recall by seniority, employees in the seniority area where the vacancy exists, provided the employee is capable of performing the job in a competent manner. If the senior employee refuses the job it will be offered to the next most senior employee and so on until the vacancy has been filled or all employees on layoff in the seniority area have refused. The refusal of an employee on layoff to accept a recall

to a sub-seniority area other than his original sub-seniority area shall not be grounds for termination as set out in Article 2.05(c).

64. Although it is clear from the evidence that Mr. Ferencz was aware at all material times that RPKC was bound by the Collective Agreement and obligated by law to honour it, he chose to entirely disregard its provisions in staffing the 1811 Avenue Road store. Instead of recalling employees by seniority in the store's seniority area, he hired a number of family members and former Dominion employees to staff the store without regard to seniority or recall rights. His wife Pamela was hired as the bookkeeper and his daughter Kelly Daniels was hired as head cashier. Prior to assuming that position, she had been a full-time employee of United Cigar Stores and a part-time employee of Dominion at its 629 Markham Road store (which has since been closed). Her husband, Douglas Daniels, was hired to be RPKC's grocery manager. Before commencing work at 1811 Avenue Road, Mr. Daniels had also been employed at Dominion's 629 Markham Road store. Mr. Ferencz also hired Patricia Vernon and bakery manager Heather Stitt, two other persons who were part-time employees at the 629 Markham Road store immediately prior to coming to work for Mr. Ferencz. Other part-time Dominion employees hired by Mr. Ferencz were Sandra Hishon and Tom Body. Mr. Ferencz hired as his grocery chief clerk Jim Weatherhead, who had been working full-time for Dominion at 550 Eglinton. Mr. Ferencz also hired Tony Conte, who was an employee of Dominion on layoff at the time that Mr. Ferencz hired him as a grocery clerk. In deciding to hire Mr. Conte, Mr. Ferencz did not take into account his seniority or recall rights, and there is nothing in the evidence to indicate that Mr. Conte was one of the employees who would have been entitled to be offered a job at the 1811 Avenue Road store pursuant to Article 2.08(e) of the Collective Agreement. Mr. Ferencz also hired his son Christopher to work at the store. Alex Heywood was hired as meat manager. Mr. Heywood had been the meat manager at the 550 Eglinton store while Mr. Ferencz was managing it for Dominion, but had taken early retirement from that store on or about May 1, 1983. Other persons hired by Mr. Ferencz after they took early retirement from Dominion around the start of May were produce manager Charles McEvoy, who had previously worked at the 1811 Avenue Road store while Mr. Ferencz was managing it for Dominion, and had also worked at 550 Eglinton while Mr. Ferencz was the manager of that store; meat cutter Robert Masterdon, who had taken early retirement from the 629 Markham Road Dominion store; and meat cutter Vincent Dowling, who had taken early retirement from a Dominion store on King Street. Cashier Gisela Petrik had also worked for Dominion prior to her retirement. Thus, almost all of RPKC's full-time staff including its department manager, head cashier, and chief clerk, were former employees of Dominion. In selecting those persons, Mr. Ferencz relied on his personal knowledge concerning their experience and ability, and, as noted above, gave no consideration to their seniority or recall rights under the Collective Agreement. The only persons hired by Mr. Ferencz who had not previously been employed by Dominion were cashier Karen Kann (who had worked with his daughter at United Cigar Stores), cashier Lisa King, and cashier and deli clerk Sandy Lenhart. Mr. Ferencz also hired approximately sixteen part-time employees, three or four more than had been employed at the 1811 Avenue Road store when he managed it for Dominion. Included in the sixteen employees were a "deli girl", a "bakery girl", and extra part-time help in the meat department. RPKC's part-time staff was recruited by posting notices on the store windows at 1811 Avenue Road, without regard to seniority or recall rights under the Collective Agreement.

65. Willett had undertaken to provide RPKC with a "turnkey operation" by cleaning, remodelling, repainting, and re-signing the premises; training some of RPKC's staff; and performing the other work necessary to ready the premises for operation as a Mr. Grocer store. Willett paid all of the wages of RPKC's employees (approximately \$13,000 to \$14,000) for the period from July 6, 1983, the date on which RPKC was given possession of the premises, to July 26, 1983, the date on which that work was completed. In remodelling the store, Willett accepted most of the

suggestions contained in a design prepared by Mr. Ferencz. When RPKC's Mr. Grocer franchise opened for business on July 27, 1983, RPKC assumed responsibility for the employees' wages and benefits.

66. In his evidence in chief, Mr. Ferencz testified that he paid the employees the rates specified in the Collective Agreement and provided all required fringe benefits for full-time employees. However, no benefits were provided until the individuals hired by Mr. Ferencz had worked at the 1811 Avenue Road store for three months, as the only seniority recognized by RPKC for any purpose was that obtained by working for RPKC at 1811 Avenue Road. Thus, Mr. Ferencz gave no recognition to seniority previously acquired through employment with Dominion. Benefits were initially provided through a Confederation Life fringe benefit package that Willett negotiated (through an insurance broker) and made available to its franchisees. However, in the spring of 1984, RPKC changed carriers and provided those benefits to employees through a ManuLife package. Although the Collective Agreement provides for a pension plan (the Dominion Store Pension Plan), RPKC has not made any payments to that plan on behalf of its employees, nor has it provided any alternate pension plan coverage. Mr. Ferencz told the Board that he had not made any enquiries as to whether the persons employed at the 1811 Avenue Road store could be covered by the Dominion Store Pension Plan. He also told us that he had never been asked to participate in the administration of that plan. Instead of the Christmas bonus of one week's pay (or the proportional fraction thereof payable where the employee has less than twelve months' service as of December 1) required to be paid by the Collective Agreement, each employee at 1811 Avenue Road received a \$100 Christmas bonus from RPKC. RPKC also failed to make the contributions to the Ontario Retail Employee Dental Benefit Trust Fund required by Article 18.08 of the Collective Agreement. That fund is administered by a Board of Trustees made up of an equal number of Dominion and Union officers. Mr. Ferencz is not a trustee of the fund and has never been asked to participate in its administration.

67. RPKC has been deducting Union dues from its employees' wages but has been depositing them into a trust account at the Toronto-Dominion Bank rather than remitting them to the Union. Mr. Ferencz told the Board that if his section 63(5) application succeeds, he will reimburse the employees for all of those deductions, but if it is dismissed, he will send the dues to the Union by cheque. When asked in cross-examination why he had not set up a similar trust fund in respect of contributions that RPKC was obligated to make to the Ontario Retail Employees Dental Benefit Trust Fund, he replied, "Because I didn't bother."

68. On July 28, 1983, Robert McKay, an experienced Local 414 business agent, attended at the 1811 Avenue Road store and presented Mr. Ferencz with a policy grievance that he had filled out on behalf of the Union (Exhibit 1). That grievance is directed to "Dominion Stores - Mr. Grocer". The language which appears in the portion of the grievance form entitled "nature of grievance" is: "Company in violation of all Articles & Appendices of the Collective Agreement. Requesting immediate compliance with the same." In presenting Mr. Ferencz with that grievance, Mr. McKay, who had known Mr. Ferencz for a number of years, told him that from the Union's perspective, the Mr. Grocer operations were nothing more than green and white Dominion stores which fell under the Collective Agreement. He also told Mr. Ferencz he was nothing but a manager for Dominion. Mr. McKay also stated that Mr. Ferencz's key department managers were former employees of Dominion and that it was improper under the terms of the Dominion early retirement plan for them to be employed in the store. Mr. McKay further told Mr. Ferencz that he was of the view that it was improper that individuals had been laid off as a result of the 1811 Avenue Road store becoming a Mr. Grocer store. However, he did not suggest to Mr. Ferencz that he should have hired any particular individual, nor did he send any Union members to the store to seek employment. His explanation to the Board in that regard was, "The Union didn't send people

to apply at Mr. Ferencz's store because Mr. Ferencz had already pre-picked his employees and hired them. We felt the exercise would be futile. It was our position that the Collective Agreement applied and that they were legally entitled to the jobs. It didn't make a great deal of sense to have people go and apply for jobs that they were legally entitled to, so grievances were filed: [Exhibit #1] and individual grievances." (The individual grievances were filed with Dominion, not with RPKC or Mr. Ferencz.) Mr. Ferencz's reply to the July 28, 1983 policy grievance on behalf of RPKC was "no violation of the agreement".

69. When the 1811 Avenue Road Store opened for business on July 27, 1983, it had an inventory of between \$150,000 and \$200,000 (wholesale value) on its shelves. As of that date, Mr. Ferencz had only put about \$5,000 of his own money into the business. Thus, it is evident that one of the benefits which Mr. Ferencz, through RPKC, derived from the franchise arrangement was the ability to obtain a substantial inventory from suppliers without providing any security, apart from the aforementioned security agreement provided to Willett. In this regard, Mr. Bletsoe told the Board, "I think that although [Willett] did not formally introduce the dealers, the supplier would have some assurance that Willett Foods on behalf of the dealer would pay them".

70. As noted earlier in this decision, although financing was available to him through the Toronto-Dominion Bank as a result of his introduction to the Bank by Dominion and Willett, Mr. Ferencz did not find it necessary to draw upon that financing. About three months after his store opened, he did avail himself of the \$50,000 interest-free loan that Willett had agreed to provide (on the terms specified in the aforementioned promissory note), but merely put that money into an interest-bearing account and collected interest on it since he did not need it to run his franchise as he was able to finance it by means of the cash flow obtained through the store's retail sales. Mr. Ferencz's ability to finance the store's operation in this manner was significantly enhanced by the fact that it initially took Willett many weeks to invoice RPKC for groceries and other products that it supplied to RPKC or that were supplied to RPKC by direct suppliers but billed through Willett. Mr. Bletsoe told the Board that Willett did not intend to create a "float" for RPKC by not billing it promptly, but found itself unable to promptly invoice RPKC for products received because Willett itself was not being properly invoiced by suppliers since there was mass confusion on the part of suppliers concerning where invoices were to be sent. Some invoices were being sent to the Willett warehouse in Ottawa; others were being sent to Willett's head office in New Brunswick and to the Willett office on Rogers Road in Toronto. This confusion, coupled with Willett's inefficient accounting system under which everything was initially going through its head office in New Brunswick, resulted in RPKC building up a substantial bank balance. At one point it had \$400,000 in the bank earning interest. Mr. Bletsoe told the Board that he was "extremely concerned" about the amount of money in that account and "tried to get most of [it]" by asking Mr. Ferencz to give him 75% of what was in the account. However, Mr. Ferencz refused to pay Willett until it could produce an accurate invoice. When Mr. Ferencz was ultimately provided with an accurate invoice, he wrote Willett a cheque for approximately \$300,000, but even then the funds remained in his account for a further four or five weeks until the cheque cleared his account. Apart from Mr. Ferencz's hearsay suggestion that the reason for that further delay was that the bank that Willett was dealing with in New Brunswick refused to cash the cheque, there is no evidence before the Board concerning why those funds remained in his account for that additional period. However, we accept Mr. Ferencz's evidence that neither the delayed invoicing nor the delayed cheque clearance was part of any arrangement that RPKC had with Willett.

71. In comparing his position as a franchisee with his former position as a Dominion store manager, Mr. Ferencz told the Board that as a franchisee he has no one above him; when he was a store manager there were a number of people above him in the chain of command, including a grocery supervisor, meat supervisor, produce supervisor, district manager, and divisional manager.

Any revenues which remain after RPKC has paid its expenses, including royalty fees, advertising fees, and rent, belong to RPKC. Mr. Ferencz no longer requires head office approval to make repairs or other expenditures. He now works a six-day week totalling between sixty and seventy hours; as a Dominion store manager he worked a forty-five to fifty hour five-day week. As a store manager for Dominion, Mr. Ferencz had to contact the Personnel Department at Dominion's head office if he wished to hire anyone, whereas he now hires whomever he wishes and staffs the store at the level that he deems appropriate. As a Dominion store manager, the range and quality of items in his store and the store's hours of operation were completely controlled by Dominion's head office, whereas as a franchisee he determines the range and quality of items that he will carry (subject to the provisions of the franchise agreement), and also determines when the store will be open. Indeed, Mr. Ferencz went so far in his evidence in chief as to state, "The distinction I would like to make is I own my own store and I have complete control - complete control of the ordering, the lines we handle, the people we hire, the working conditions, the control of the expenses, and every aspect of the operation I control."

72. However, the franchise agreement contains a number of provisions which give Willett (which it will be remembered is referred to in that agreement as "Mr. Grocer") a substantial degree of control over RPKC (the "Dealer"). Under paragraph 3.3, the Dealer is required to deliver to Mr. Grocer weekly a written statement of "Dealer's Sales" (as defined in paragraph 1.4) during the preceding week. Paragraph 3.4 imposes a similar obligation in respect of "Net Dealer's Sales" (as defined in paragraph 1.8) on a quarterly basis. Under paragraph 3.5, Mr. Grocer controls the manner and timing of the way in which the advertising fees (which RPKC and other franchisees are obligated to pay to Mr. Grocer) will be applied toward the advertising and promotion of the Mr. Grocer concept. Mr. Grocer retains a broad discretion in respect of the prices that it charges its franchisees for products and in respect of the proportion of volume purchase discounts or rebates (ECR's) which will be passed along to franchisees through those prices (paragraphs 4.1 and 9.1). Under paragraph 5.1, interest is payable by RPKC on all amounts overdue under the agreement at an annual interest rate six per cent above the prime bank commercial lending rate. Paragraph 6 contains a number of limitations concerning RPKC's use of the Mr. Grocer trademark (referred to in the agreement as the "Mark"). Paragraph 6.13 gives Willett the right (during RPKC's normal hours of business) to inspect the subleased premises and RPKC's methods of operations "to ensure that the Premises and the Dealer's operations are maintained at a high level consistent with Mr. Grocer's goodwill associated with the Mark and consistent with the quality required by [the franchise] agreement." Paragraph 8 of the franchise agreement provides:

8. SOURCES OF SUPPLY

- 8.1 Mr. Grocer shall sell to the Dealer, and the Dealer shall obtain from Mr. Grocer exclusively, or from such sources of supply as Mr. Grocer may first approve in writing, all Products and all services, upon and subject to the terms and conditions herein set forth.
- 8.2 The Dealer may obtain from such other sources of supply any Products not listed in Mr. Grocer's published price book but only so long as they are not listed, the intention being that while Mr. Grocer shall not be obliged to carry in stock any Products to supply the Dealer which it does not carry to supply its other franchised dealers, it shall nevertheless have the opportunity at all times to supply the Dealer with all Products which it does or is willing to carry in stock or otherwise supply and which the Dealer requires.
- 8.3 The Dealer may obtain from such other sources any services not listed in Mr. Grocer's published price book but only so long as they are not listed, the intention being that while Mr. Grocer shall not be obliged to offer any services to the Dealer which it does not offer its other franchised dealers, it shall nevertheless have the opportunity

at all times to supply the Dealer with all services which it does or is willing to provide or otherwise supply and which the Dealer requires.

- 8.4 Notwithstanding the foregoing, the Dealer's rights under subparagraphs 8.2 and 8.3 hereof shall be subject at all times to Mr. Grocer's prior written approval as to:

- (a) source of supply;
- (b) products to be supplied;
- (c) source of services; and
- (d) services to be performed.

- 8.5 Nothing in this agreement shall prevent Mr. Grocer from ceasing to supply to its franchised dealers any Products or services theretofore listed in Mr. Grocer's published price book.

Paragraph 12 provides:

12. OPERATION OF BUSINESS

- 12.1 The Dealer covenants and agrees with Mr. Grocer that throughout the Term of this agreement, the Dealer shall:

- (a) carry on business in the Premises in an efficient, reputable and businesslike manner in an endeavour to achieve and develop profitable and ever improving operating results not only for the Dealer's own benefit but also for the benefit of Mr. Grocer's other franchised dealers carrying on their businesses with like endeavour in other locations under the same trade name and style whose operating results will reflect at least to some extent the public image, reputation and operating results of the group as a whole;
- (b) not permit any public auction to be held from the Premises;
- (c) not do or omit to do anything which if done or omitted might be injurious to the business, public image or reputation of Mr. Grocer, its other franchised dealers, Mr. Grocer's names or the Mark;
- (d) render to the public courteous, efficient and prompt service;
- (e) keep the Premises in a clean, healthful and attractive condition in accordance with Mr. Grocer's operating manual;
- (f) require the Dealer's employees to wear the uniforms which are specified by Mr. Grocer and ensure that such uniforms are kept in a clean and attractive condition and replaced when necessary;
- (g) to keep the Premises open for business during such hours and on such days as may be required by Mr. Grocer's head lease, if any, of the Premises and otherwise, subject to any extraordinary circumstances beyond the control of the Dealer or the Guarantor, during such hours and on such days as retail stores within the Municipality in which the Premises are located are generally open for business, all except where prohibited or restricted by any statute, law, by-law, rule or regulation, whether municipal, provincial or federal;
- (h) maintain in the Premises at all times a balanced variety of merchandise having a total value according to Mr. Grocer's published price book of not less than the Minimum Inventory Value;

- (i) provide an adequate flow of relevant financial information to Mr. Grocer as requested by Mr. Grocer for the purpose of analysis as hereinbefore provided;
- (j) permit authorized representatives of Mr. Grocer to enter the Premises at any time or times during the Dealer's regular business hours and examine or audit the Dealer's records and books of account, which records and books of account the Dealer shall keep at the Premises throughout the Term and which records and books of account shall contain a full and accurate record of all purchases, sales and other transactions of the Dealer's business;
- (k) pay and meet all debts and obligations of the business carried on in the Premises promptly as they become due, and produce evidence of payment of same upon request therefor by Mr. Grocer;
- (l) not borrow money or obtain credit or permit any lien, charge or encumbrance to exist or give a security interest in the Products or any other assets on or upon the Premises or any other assets of the Dealer used in the business of the franchise hereby granted without the prior written consent of Mr. Grocer;
- (m) participate in such merchandising and advertising programs as Mr. Grocer deems appropriate from time to time for use in connection with the Dealer's business at the Premises and if any such merchandising or advertising programs in the geographic location of the Premises make reference to the price at which Products may be purchased, the Dealer shall not sell such Products for a price higher than the advertised price provided that the Dealer may sell such Products at a price lower than that indicated in any such advertising, and
- (n) subject to paragraph 12.1(m) hereof, not sell any Products at a price higher than that suggested therefor in Mr. Grocer's then current published price book provided that the Dealer may sell any Product at a price lower than that suggested therefor.

The "Minimum Inventory Value" specified in Schedule A to the franchise agreement is \$200,000. Paragraph 13 makes it clear that although the selling prices suggested in Mr. Grocer's published price book "are suggested as being the optimum consistent with being competitive in obtaining the maximum volume of sales", RPKC is free to sell at such lower prices as it chooses. Paragraph 14 is a covenant by RPKC and the Ferenczs not to compete with Willett. It provides:

The Dealer and the Guarantor covenant and agree with Mr. Grocer as follows:

- (a) that during the Term of this agreement neither the Dealer nor the Guarantor will engage in, have any interest in, work for, or be associated with, directly or indirectly, any retail food store other than at the Premises; and
- (b) that for a period of six (6) months after the expiration or termination of this agreement neither the Dealer nor the Guarantor will engage in, have any interest in, work for, or be associated with, directly or indirectly, any retail food store located within a radius of one (1) mile of the Premises except as may be permitted pursuant to the Sublease.

The circumstances in which Mr. Grocer can legally terminate the franchise agreement are described as follows in paragraph 16:

16.1 In the event that the Dealer or the Guarantor:

- (a) fails to pay any amount owing to Mr. Grocer under this agreement when due; or
- (b) breaches or fails to perform or observe any of the provisions, terms, conditions, agreements or covenants contained in paragraphs 3, 6, 7, 8, 12.1(b), 12.1(g), 12.1(j), 12.1(l), 12.1(m), 14.1(a), 15, 22 or 23 by the Dealer to be paid, performed or observed; or
- (c) during the Term or any renewal thereof receives from Mr. Grocer a notice of default in respect of a matter other than one referred to in paragraph 16.1(b) hereof and:
 - (i) if such notice is the first notice in respect of such matter during the Term or any renewal thereof, as the case may be, fails to cure such default within five (5) days,
 - (ii) if such notice is the second notice in respect of such matter during the Term or any renewal thereof, as the case may be, fails to cure such default within two (2) days, or
 - (iii) if such notice is the third notice in respect of such matter during the Term or any renewal thereof, as the case may be;
- (d) breaches or fails to perform or observe any of the provisions, terms, conditions, agreements or covenants contained in the Sublease, the Security Agreement or any other lease, agreement or contract to which the Dealer and Mr. Grocer are parties; or
- (e) becomes insolvent or bankrupt or makes a general assignment for the benefit of its creditors or otherwise acknowledges its insolvency; or
- (f) if a liquidator or a receiver or a receiver and manager or a trustee in bankruptcy be appointed for the Dealer,

then, in any such event, Mr. Grocer, at its option and without prejudice to any other remedies it may have, may terminate this agreement by giving to the Dealer written notice of such termination and the Dealer shall vacate the Premises forthwith (subject only to any provision of the Sublease to the contrary) and thereupon shall pay any and all amounts due and owing to Mr. Grocer.

- 16.2 It is hereby expressly agreed that in the event of the termination of the Sublease and the revocation of the licence granted in respect of the Mark, or either of them, or in the event Mr. Grocer enforces its security under the Security Agreement for any reason whatsoever, this agreement shall automatically terminate at the same time.

RPKC also has reporting obligations under the franchise agreement concerning breaches of that agreement, the sublease, and the security agreement. Paragraph 17.1 reads:

The Dealer or the Guarantor shall give written notice of any breach of this agreement, the Sublease, the Security agreement or any other lease, agreement or contract to which the Dealer and Mr. Grocer are parties or of any circumstances such as would entitle Mr. Grocer to terminate, whether with or without notice, this agreement, the Sublease or any other lease, agreement or contract to which the Dealer and Mr. Grocer are parties or such as would entitle Mr. Grocer to exercise any rights or powers under the Security Agreement, such notice to specify the particulars of such breach or circumstance and to be delivered to Mr. Grocer so soon as such breach becomes known to the Dealer or the Guarantor, as the case may be.

Paragraph 22 contains a number of restrictions on transferring the franchise. For example, paragraph 22.1 provides:

Without the prior written consent of Mr. Grocer, which consent may be unreasonably or arbitrarily withheld by Mr. Grocer, the Dealer shall not transfer by sale, assignment, gift, or otherwise the business, or any part thereof, carried on in the Premises.

Paragraph 22.4 provides:

If the Dealer is a corporation then:

- (a) the Principal Shareholder represents and warrants that he owns beneficially more than 50% of the issued and outstanding shares of the Dealer having full voting rights under all circumstances and that the votes carried by such shares are sufficient, if exercised, to elect a majority of the board of directors of the Dealer and that the balance of the shares in the capital of the Dealer, if any, are owned by the Minority Shareholders;
- (b) the Guarantor and the Dealer covenant and agree that no transfer by sale, assignment, pledge, gift or otherwise and no allotment and issuance of any shares in the capital stock of the Dealer or any corporation which controls the Dealer, directly or indirectly, will be made, except with the prior written consent of Mr. Grocer;
- (c) any transfer, whether by sale, assignment, pledge, gift or otherwise and any allotment or issuance of any shares in the capital stock of the Dealer or any corporation which controls the Dealer directly or indirectly, without the prior written consent of Mr. Grocer shall be deemed to be an event of default and the provisions of paragraph 16.1 of this agreement shall apply *mutatis mutandis*;
- (d) a copy of the shareholders' agreement, if any, for the Dealer will be submitted to Mr. Grocer for its approval (which may be arbitrarily and unreasonably withheld) prior to execution of such agreement and no amendments shall be made thereto without first obtaining Mr. Grocer's approval, which may be arbitrarily or unreasonably withheld; and
- (e) the articles of incorporation and by-laws of the Dealer shall recite that the issuance and transfer of any shares of the Dealer is restricted by the terms of this agreement and copies thereof shall be furnished to Mr. Grocer upon Mr. Grocer's request.

73. The evidence indicates that the actual operation of the franchise has deviated in some respects from the terms of the franchise agreement. For example, although paragraph 12.1(e) refers to a "Mr. Grocer's operating manual", no such manual exists. Approximately 80% of the produce, 60 to 65% of the groceries, and 5 to 10% of the bakery products sold by RPKC are supplied directly by Willett. The remainder comes from direct suppliers. Some of those direct suppliers are "authorized suppliers", i.e., direct suppliers who invoice Willett for goods supplied to franchisees, who are subsequently invoiced by Willett for those goods. RPKC (and other franchisees) also obtain some goods from "unauthorized suppliers". Although Mr. Ferencz has never obtained written approval to do so (in accordance with paragraph 8.1 of the franchise agreement), it is clear from the evidence as a whole that Willett has no objection to RPKC dealing with those "unauthorized suppliers". Although that term might be thought to connote an element of impropriety, the evidence indicates that it merely refers to suppliers with which Willett does not have arrangements to accept being invoiced on behalf of franchisees. From time to time Willett provides franchisees with updated lists of "unauthorized suppliers" which "are not to be billed through Willett Foods", and of suppliers which have become "authorized suppliers" that "are to be billed through Willett Foods". When he was asked in chief what Willett's position is when a franchisee such as RPKC uses an unauthorized supplier, Mr. Bletsoe replied, "Well, in most cases we will tell the dealer or give him a verbal approval to go ahead and deal with that supplier, but in some cases we may rec-

commend that he not deal with them for a variety of reasons.” Mr. Bletsoe offered “a non-federally meat inspected meat supplier” as an example of a supplier that Willett would caution a franchisee against dealing with. However, there is no evidence that RPKC has had any dealings with any such suppliers, or that it has ever dealt with a supplier that Willett has suggested should be avoided. Moreover, Mr. Ferencz acknowledged in cross-examination that Willett was fully aware of the suppliers that were supplying the 1811 Avenue Road store. The same is true of the arrangements which Mr. Ferencz made to operate a Video Store franchise at the 1811 Avenue Road premises. In order to do so, he invested approximately \$22,000 to purchase video equipment and cassettes for rental. Although Willett had made arrangements with a video supplier to provide that type of equipment to franchisees, Mr. Ferencz did not find those arrangements to be satisfactory. Thus, he chose to make his own arrangements. However, it is clear that Willett had no objection to that and did not attempt to dissuade or prevent Mr. Ferencz from doing so. Moreover, RPKC pays royalty fees to Willett on all revenues obtained through its video rentals. RPKC also pays royalties on the revenues generated by the video games and mechanical rides which it rents from a vending company for use on the premises.

74. Willett has not enforced the maximum selling price provisions in respect of every retail product in the store. It does provide franchisees with maximum retail price lists based upon monthly information provided by a price check service to which it subscribes, and weekly price checks performed in competitors’ stores by a Willett employee. However, it also encourages franchisees to perform their own price checks on staple items in order to ensure that they are competitive within their own trading areas. Mr. Ferencz has done so and has advised Willett, through the retail counsellor responsible for the 1811 Avenue Road store, that in some instances he has raised his prices on certain items above Willett’s maximum selling price where that maximum selling price is lower than his competitors’ prices. Although Willett is anxious to avoid creating an impression of “gouging” by its franchisees, it does not tend to strictly enforce the maximum price provision except in respect of advertised products where prices exceeding the advertised price could give rise to charges of false or misleading advertising. If Mr. Ferencz considers the advertised price to be too low, he limits his loss by placing an appropriate limit on the number which will be sold to each customer. If he disagrees with (non-advertised) “in-store features” offered by Willett, he either refuses to feature them or features them at his own price. Notwithstanding paragraph 12.1(g) of the franchise agreement, Mr. Ferencz determines opening and closing hours for his store based upon what he feels to be the requirements of the community. Thus, the store hours at his franchise location differ from three of the chain hours in the area and also from those of an independent grocer three blocks away.

75. RPKC’s actual margins at 1811 Avenue Road were higher than those predicted by Willett, as were its profits. However, during its first nine months of operations, wages and benefits were 10.52% of sales, which is almost precisely what Willett estimated they would be. In its second nine months of operation (from May 1, 1984 to January 26, 1985), RPKC continued to show a profit that was substantially greater than that predicted by Willett, even though its wages and benefits only fell to 10.1% of sales, rather than the 8% level predicted by the pro formas. The same is true of its financial statements for its fiscal year that ended April 30, 1985, in which wages and benefits constituted 10.15% of sales. Thus, the financial statements produced at the hearing of this matter confirm Mr. Ferencz’s testimony that RPKC can continue to make a profit even if its wages and benefits amount to over 10% of its sales and do not fall to 8%.

76. It is clear from the evidence that the employees working at the Mr. Grocer store at 1811 Avenue Road exercise the same skills that were exercised by the persons employed at that location when it was a Dominion store. As a Mr. Grocer store, it offers a range of products that is very similar to that which was offered while it was a Dominion store.

77. On June 21, 1983, Mr. Higson (the Local Director of Local 414) wrote to Chuck Robertson, Dominion's Manager of Labour Relations, as follows:

Please be informed that it is the Union's position that the Mr. Grocer stores that are to be opened are subject to the current Union Agreement between Dominion Stores Limited and Retail, Wholesale and Department Store Union, Local 414.

The Union, therefore, wishes to go on record that any Mr. Grocer store opened and found not to be subject to the present Collective Agreement will be subject to the Grievance Procedure of the said Collective Agreement.

It is also the Union's contention that any independent bargaining with any other party including franchisees constitutes a violation of Section 64-66 and 67 of the Labour Relations Act.

We would appreciate an immediate answer to the above.

In his reply dated June 24, 1983, Mr. Robertson advised Mr. Higson that he had forwarded a copy of his letter to Mr. Sorensen for his information.

78. On September 28, 1983, Mr. McKay delivered the following letter to Mr. Ferencz at the 1811 Avenue Road Store:

Please be advised that our Union takes the position that your store is covered by the subsisting Collective Agreement with Dominion Stores Limited, a copy of which is enclosed.

You should be aware that there are proceedings pending before the Ontario Labour Relations Board pursuant to sections 64, 63 and 89 of the Labour Relations Act which touch on this question.

Please be advised that our Union requires you to honour the provisions of the Collective Agreement and may seek recourse through the grievance procedure or otherwise, if you do not.

If you have any questions about the foregoing, we would be pleased to meet with you.

79. A further grievance was filed with Mr. Ferencz on or about December 14, 1983 through the following letter addressed to Mr. Ferencz as "Lessee/Manager, c/o Mr. Grocer, 1811 Avenue Road":

As of December 8th, 1983 Retail, Wholesale and Department Store Union, Local 414 is not in receipt of any Union dues from the date of opening. To keep the employees in good-standing, it is necessary to pay the Union dues. Therefore, would you please forward these deductions to us at the Union Office, 15 Gervais Drive, Suite 102, Don Mills, Ontario, M3C 1Y8.

There is also the payment of 12¢ per hour, 13¢ on January 1st, 1984 for coverage under the Dental Plan that the Company should be paying.

The payment of Union dues is on the following basis:

1. 2-hours pay per month.
2. \$11.00 a month *minimum*.
3. \$10.00 Initiation Fee for all *new* employees.

If you have any questions please feel free to contact me.

80. Five days later, Mr. Higson sent the following letter dated December 19, 1983 to

Dominion, Willett, and nine individuals referred to in the letter as "Mr. Grocer Store managers", including Mr. Ferencz:

As you are aware, Retail, Wholesale & Department Store Union, Local 414, take the position that the existing Collective Agreement with Dominion Stores Limited applies to all Mr. Grocer Stores which were formerly stores covered by the contract.

Certain of the new Mr. Grocer franchisees have admitted that they are bound by the Collective Agreement pursuant to Section 63 of the Labour Relations Act. There are proceedings pending before the Labour Relations Board and this question relating to the future [sic].

As of December 8th, 1983 the Union has not received union dues from the date of opening your store. To discharge your obligation under the Collective Agreement, it is necessary to remit to us the union dues.

The union dues required is as follows:

1. 2-hours pay per month
2. \$11.00 a month minimum
3. \$10.00 Initiation Fee for all new employees

Please provide the deductions to us at -

Retail, Wholesale & Department

Store Union, Local 414

15 Gervais Drive,

Suite 102

DON MILLS, Ontario M3C 1Y8

In addition there is also the payment of twelve (12) cents per hour, thirteen (13) cents on January 1st, 1984 for coverage under the Dental Plan that the Company should be paying.

You should be aware that the Union takes the position that Dominion Stores Limited, Willett Foods Limited, and the franchise [sic] are related employers under Section 1(4) of the Labour Relations Act, and are thereby jointly and severally liable for any breaches of the Collective Agreement.

If you should have any questions, please feel free to contact me.

81. Barry W. Earle, of counsel for the respondent, replied to that letter as follows on January 12, 1984:

We are the solicitors for RPKC Holdings Corporation ("RPKC") which is operating the Mr. Grocer store at 1811 Avenue Road in North York as an independent franchised dealer. A copy of your letter of December 19, 1983, has been forwarded to us for reply.

As you know, RPKC made an application dated September 22, 1983 to the Ontario Labour Relations Board ("O.L.R.B.") under section 63(5) of the *Labour Relations Act*. In that application, RPKC took the position that a sale of a business has taken place, and as a result RPKC was bound by the collective agreement between Retail, Wholesale and Department Store Union, Local 414 (the "Union") and Dominion Stores Limited. In the same application, however, RPKC has asked the O.L.R.B. to terminate the bargaining rights of the Union effective July 26, 1983, which is the date RPKC commenced to operate the Mr. Grocer franchise.

If RPKC was granted the relief sought in its application, the result would be that the union dues you are claiming and payments for dental coverage would not be required to be made. Accordingly, until this matter is disposed of by the O.L.R.B., it would, in our view, be inappropriate and premature to make the payments requested in your letter of 19th December, 1983.

82. In its 1983 Annual Report, Dominion described the purpose of the Mr. Grocer franchise programme as follows:

The Company is in the process of strategically covering the markets it serves with a combination of conventional Dominion supermarkets, Best For Less warehouse stores and franchised Mr. Grocer neighbourhood grocery stores. These three retail vehicles have been developed to continue Dominion's prominence in the retail food sector.

By the end of 1983, ten Mr. Grocer franchises had been opened (in addition to the aforementioned corporate store in Markham). Each of them had previously been a Dominion store. Eight of the ten franchisees were former employees of Dominion.

83. Mr. Higson filed yet another grievance with Mr. Ferencz in October of 1984 by means of a letter dated October 19, 1984 which read:

Pursuant to Article 7:10 of the Collective Agreement the Union grieves that the employer has, and continues, to contravene the terms and conditions of the Collective Agreement in their entirety. Without limiting the generality of the foregoing the Union states that the employer has violated Articles 2, 3, 8, 10, 11, 12, 18, 19, 21, 31, and 36.

The Union requests:

- a) compensation bearing interest for itself and all bargaining unit members who have suffered losses.
- b) cease and desist direction.
- c) direction that the employment and position status be corrected for all unit members whose jobs have been affected by the breaches of the Collective Agreement.

84. By October of 1985 when Mr. Bletsoe gave his evidence in this matter, David Radler had become the President of Dominion and Willett. Mr. Bletsoe reported directly to him. Mr. Bletsoe's only peer in Willett was Mr. Ashton, who had become the General Manager of the Willett plant which served as a wholesaler to Mr. Grocer and other customers. As of that time there were 47 Mr. Grocer stores in Ontario. Two of them were former competitor locations. One of them had been a Thrift store operated by Dominion at 666 Burnhamthorpe Road, Mississauga. (Thrift stores were also covered by the Collective Agreement, although an appendix (Appendix "G") to that document made some of its provisions inapplicable to Thrift stores and Best for Less stores.) That Mr. Grocer location formed the subject matter of the Board's *Penmarkay* decision, [1984] OLRB Rep. Sept. 1214, which will be referred to in greater detail below. The remaining locations had all been Dominion stores prior to being franchised as Mr. Grocer stores. Thirty-four of those 47 stores were franchised to former employees of Dominion and one of the remaining thirteen was franchised to a former employee of Willett. The majority of those 34 persons were employed by Dominion immediately prior to becoming Mr. Grocer franchisees.

85. By January 21, 1986, when Mr. Collins gave his evidence before the Board, in addition to the 44 former Dominion stores and the one former Thrift store that had been franchised as Mr. Grocer stores, a number of other former Dominion stores had been converted to other food uses (by subleasing them to independent grocers), converted to non-food uses, or closed down completely. A further 92 stores had been sold by Dominion to A & P, which was operating them under

the name "New Dominion Stores Inc.". More than 80 of those 92 stores were covered by the Collective Agreement. On November 12, 1984, the Union and New Dominion Stores Inc. entered into a collective agreement effective until June 21, 1986. The scope clause in that agreement, which as of January of 1986 covered approximately 6,000 employees, is identical to that in the Collective Agreement, insofar as it pertains to Ontario. Approximately 1,600 Union members in the remaining 26 Dominion stores continued to be covered by the scope clause in the Collective Agreement (as of January 21, 1986).

86. Willett employs four retail counsellors to assist franchisees and to protect Willett's interests by making sure that Willett's weekly statements to franchisees are duly paid. Each retail counsellor is assigned eleven or twelve Mr. Grocer stores within a particular territory, and is responsible for helping them to become as profitable as possible. They provide franchisees with current marketing information and counsel them on a variety of topics. Mr. Bletsoe holds regional meetings with franchisees every four to six months. Those meetings are designed to identify and resolve mutual problems, provide franchisees with updates on changes in the industry, relate new or innovative merchandising or advertising ideas, and bind the franchisor and the franchisees closer together in a spirit of mutual co-operation.

87. When he was asked by Union counsel what there was in the Collective Agreement that would cause him trouble in operating his franchise, the only specific things mentioned by Mr. Ferencz were transfer of employees between stores, the full-time - part-time ratio, and the wage structures for part-time employees. He also told the Board that he wanted to have the Union decertified because his family is working at the store and because he feels that the employees in the store are paid a fair wage and "are represented very, very fairly by [him]". In re-examination, he elaborated on those concerns. He told the Board that as an "independent franchisee" he did not want to be part of a seniority area composed of some 40 or 50 stores for purposes of promotions, layoffs, and recalls. Upon having his attention directed by his counsel to certain other specific provisions in the Collective Agreement, Mr. Ferencz told the Board that he would not want the Dominion Personnel Manager dealing with requests by "his employees" for personal leave of absence of more than three working days (under Article 4.02). He also told the Board that in order to maintain control over the store, he would not want to have the Dominion District Manager dealing with Step 2 grievances, or discharge or suspension grievances from the 1811 Avenue Road store (pursuant to Articles 7.05 and 7.15), or resolving overlapping vacation requests by department managers (pursuant to Article 21.16). He suggested that Article 4 of Appendix "B" to the Collective Agreement was made for Dominion Stores and would not pertain to "an independent". That provision dictates the number of meat cutters which must be appointed, based on sales volume. He also told the Board that he would not want to take on part-time employees from other stores in the event that they wished to transfer to his store or in the event that he required additional full-time employees (in accordance with Articles 10.04 and 10.06 of Appendix "D" to the Collective Agreement).

88. One of the witnesses called by Dominion and Willett in these proceedings was Allen Karp, an expert in business law and franchising. Apart from testifying in these proceedings, Mr. Karp has not been involved in any way with the Mr. Grocer franchise programme. Over the objection of Union counsel, Mr. Karp was permitted to give evidence concerning the history of franchising, the substantial impact which it has had on commercial activity in Ontario and in Canada in recent years, its current status, the nature of the franchising relationship, and typical components of franchise agreements. He also testified concerning the similarity between the controls found in a typical franchise agreement and those found in a typical commercial lease. In providing the Board with an encapsulated description of how a franchise typically commences, operates, and expands, Mr. Karp noted that a franchisor generally builds up a "body of know-how" concerning such matters as the kind of goods to sell, where to buy them, how best to advertise and display them, the

hours to remain open, and the most appealing format for fixturing and signing. He described a franchise as a contractual arrangement which enables the franchisee to use the expertise, goodwill, business practices, logos, and trade marks, which identify him as being part of the franchisor's corporate family, thereby enabling the franchisee to compete with others as if he were part of a wholly-owned and wholly integrated chain. He suggested that there is a "mind set" in a successful franchise relationship which makes it different from other methods of operation. That mind set arises from the existence of a franchisee who is motivated to make the business succeed in order to maximize his or her profit and to minimize the risk which comes from having personal assets (and often those of friends and relatives) exposed, together with the obligation that a franchisee feels toward employees, to see that their jobs continue. Mr. Karp identified uniformity as being of critical importance to a successful franchising system. Uniformity maintains and promotes the franchisor's goodwill by enabling consumers to be assured that they will obtain the same level of quality and service at every outlet of a franchise system. He also noted that uniformity is legally essential because the Canadian trade mark system requires that uniformity of quality be maintained if a trade mark is not to be extinguished. Thus, Mr. Karp expressed the view that there must be controls in a franchise system "both from a legal sense as well as from a very practical sense of protecting the goodwill of the system". He described those controls as generally consisting of a "host of rules" under which the franchisee is to operate the business, and added, "They are generally fairly extensive and relate to those aspects of the franchisor's business and his assets that he is in effect lending for this period of time to the franchisee, those things that deal with uniformity, quality of service and products, trade marks, the overall image of the business, and what it looks like to the public and so on."

89. After outlining the various ways in which a franchisor can obtain remuneration through a franchise system, Mr. Karp reviewed various terms of the Willett-RPKC franchise agreement that impose controls on the franchisee and told the Board that they are normal and common in franchise agreements. He also described the various business interests of the franchisor which such controls are generally designed to protect. For example, he suggested that the paragraph 5.1 interest rate of six percent above prime on amounts overdue is one of the mechanisms which the franchisor has chosen to employ to ensure that it will be paid, or, if it is not paid, that it will be "appropriately recompensed". It was his evidence that a franchisor's right of inspection similar to that contained in paragraph 6.13 is "virtually universal" in franchise agreements in view of the need for uniformity to protect the franchisor's goodwill and trade marks. He further testified that provisions such as paragraph 8.1 which limit the franchisee's sources of supply are designed to foster consistency and uniformity, and also to provide a source of profit for the franchisor. He described paragraphs 12.1(a), (d), (e), and 14.1 as "almost universal", and paragraphs 12.1(f), (g), (h), and (i) as "standard", but also testified that provisions such as paragraph 12.1(g) are "frequently honoured in the breach, because there's an area of friction between operators who feel they're running their own show and a franchisor who says, 'You must stay open to meet your competition'." He noted that although a franchisor can lawfully put a ceiling on selling prices as Willett has done in paragraph 12.1(n), the *Combines Investigation Act* precludes a franchisor from insisting that a franchisee maintain minimum selling prices. Thus, he expressed the opinion that by including paragraph 13.1 in the franchise agreement, the draftsman was "being somewhat self-serving and trying to protect himself from section 38 of the *Combines Investigation Act*." However, he also suggested that in setting prices, franchisees by and large seek to set prices that are reasonable in terms of attracting business, yet high enough to ensure that the franchisor is receiving an appropriate royalty, and that the franchisee's profits are being maximized, since one of the most important things for a franchisor is to see that his franchisees are successful. Mr. Karp described Willett's security arrangements with RPKC as being normal from a commercial point of view. He also told the Board that it is "virtually universal" to have personal guarantors in a franchise agreement where the franchisee is a newly incorporated company that is a shell without assets, since the franchisor "will want to

make sure that it's receiving the covenants from people who are tied in and can make good for the obligations that are going to arise." He also suggested that a franchisor wants to ensure that franchisees have "something on the line" so that they will be motivated to fulfill the covenants in order to protect themselves from personal loss.

90. Mr. Karp also told the Board that in a new franchise system a franchisor will often offer a variety of inducements to prospective franchisees in order to build the system. For example, a franchisor might initially waive its franchise fee, provide a direct loan, provide rent reductions or extended terms on a lease, or work out a financing arrangement with a bank. He also suggested that subsidization by a franchisor of a franchisee's legal fees in litigation can be a further inducement. When his attention was directed to the proviso which gives RPKC the right to terminate the franchise agreement on thirty days' written notice, and to the "walk letter", Mr. Karp said that he would not call it a normal provision, but indicated that he did not consider it to be unique or highly unusual as provisions of that type are not infrequently used in the context of a new franchise system. Mr. Karp testified that it is "standard" for a franchisor to arrange insurance packages by which franchisees can insure their premises and provide employee benefit coverage. He also told the Board that it is becoming "more and more common" for a franchisor to provide a turnkey operation to a franchisee. Mr. Karp suggested that one of the great advantages of franchising in the retail food industry, "where one percent of sales is considered to be a healthy after-tax profit", is that it allows a franchisee to be part of a buying family and to take advantage of volume purchasing power. He told the Board that although it can be argued that a franchisor such as Willett is in a position to set prices at any level that it wishes and thereby eat up all of the ECR's and more, that is not typical since, in his experience, ECR's are virtually always shared between the franchisor and the franchisee, thereby enabling the franchisee to purchase inventory for less than it would cost if the franchisee were an independent operator who was not part of a franchise system. He also suggested that enforcement of maximum pricing by a franchisor is not an element which allows the franchisor to control the franchisee's profits because, in order for the franchise system to succeed, pricing has to be set based on market considerations. He further indicated that a franchisor must strike a balance with respect to maximum profitability for its franchisees so that they will succeed, maximum pricing so that sale prices are as high as possible (since royalties are generally a percentage of sales), and pricing that is not so high that it drives potential customers to competitors. It was his evidence that the main variables of profitability are "shrinkage", advertising costs, general administrative costs, and labour costs. "Shrinkage" refers to revenue losses due to such things as theft, mispricing, incorrect ringing up of goods at the cash register, mistakes in checking invoices and making payments, and failure to display perishables in such a manner that they turn over within their life cycle. In cross-examination by Union counsel, Mr. Karp acknowledged that although there are specific types of provisions which commonly occur in franchise agreements, their particular configuration may differ substantially from one franchise to another. He also agreed that the area of franchisor's controls remains a significant area of continuing controversy between franchisors and franchisees, and that the degree of control that franchisors exercise over franchisees varies substantially from franchisor to franchisor. He identified business considerations, anti-trust legislation, foreign investment review legislation, common law principles concerning restraint of trade, and labour law considerations as being some of the factors which must be taken into account in devising an appropriate level of control of a franchisor over a franchisee. He also conceded in cross-examination that under a franchise agreement such as the one between Willett and RPKC, the franchisor has the power to affect gross margins by setting the wholesale prices at which it sells goods to the franchisee and the maximum prices at which the franchisee can sell those goods to the public. However, he added that in franchises involving a multiplicity of products, maximum pricing provisions are almost universally not enforced, except on promotional items. During re-examination, Mr. Karp indicated that he has never encountered a situation in

which a franchisor has manipulated a franchisee's gross profit by manipulating the franchisee's buying price and selling price.

91. Counsel for Dominion and Willett called Frank Zaid as a second expert witness in these proceedings. Mr. Zaid edits the *Canadian Franchise Guide*, a monthly subscription service intended to provide an overview of the issues encountered in setting up or administering a franchise programme. He told the Board that it is not intended to be a legal treatise or an editorial service; it is intended to be a management tool which provides a practical guide for setting up and administering franchise programmes. A passage from the Guide was quoted by the Board in paragraph 24 of the *Penmarkay* decision, which reads, in part, as follows:

The conclusion we have reached ought not to surprise the labour relations community in Ontario. White and Zaid [*Canadian Franchise Guide* (Don Mills): Richard De Boo, 1983] at 2-626, recognized the potential of section 1(4) in the context of franchising:

This broadly drafted subsection was enacted to deal with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act is carried out by or through more than one legal entity. The Labour Relations Board is empowered to pierce the corporate veil where such legal entities carry on related business activities under common control or direction. The provision is designed to ensure that the institutional rights of a trade union and the contractual rights of its members will attach to a definable commercial activity rather than the legal vehicles through which that activity is carried on. There is no doubt, in proper circumstances, that a franchised operation could fall within the ambit of the section and a franchisor and some or all of the franchisees be deemed to constitute one employer for the purposes of the application of the *Labour Relations Act*.

Mr. Zaid gave the Board some examples of what he had in mind when he wrote the words "in proper circumstances". Although we permitted that evidence to be adduced over the objection of counsel for the Union, we reserved on the weight, if any, to be given to it. Having now had an opportunity to review that evidence, we have decided that it (and the balance of Mr. Zaid's evidence) is not of assistance to us in deciding the matters before us in these proceedings.

92. As noted above, RPKC concedes that Dominion has sold part of its business to RPKC and that, accordingly, there has been a sale of a business by Dominion (through Willett) to RPKC within the meaning of section 63 of the Act. Under section 63(2), where an employer that is bound by a collective agreement sells his business (or "a part or parts thereof"), the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party to that collective agreement. However, counsel for RPKC contends that his client has changed the character of the business so that it is substantially different from the business of Dominion, the predecessor employer. Accordingly, he seeks to have the Board terminate the Union's bargaining rights pursuant to section 63(5), which provides:

The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

In support of that request, counsel for RPKC contended that the 1811 Avenue Road store has gone from being a chain store operation, managed by an employee of Dominion, to a franchise operation owned and operated by RPKC as an "independent franchise dealer", and that it should

not be bound by the terms of a collective agreement designed for a chain store operation. Although he conceded that there has been no change in the nature of the work performed by the persons employed at the 1811 Road store, counsel submitted that other changes in the character of a business, such as the change from a chain store to a franchise store, should be sufficient to prompt the Board to exercise its discretion under section 63(5) of the Act to terminate a trade union's bargaining rights.

93. In *Winco Steak N' Burger Restaurants Limited*, [1974] OLRB Rep. Nov. 788, the Board wrote, in part, as follows:

24. The implementation of subsection 5 of section 55 [now subsection 5 of section 63] involves the revocation of the remedial effects otherwise flowing from the provisions of section 55 of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words "substantially different" must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review. (Reference was made to *Man of Aran Ltd.*, [1973] OLRB Rep. June 313. That case, however, is confined to its own particular facts.)

In the *Winco* case, the predecessor employer had carried on a tavern business in which the restaurant was an "unspecialized type of operation based upon a menu offering a common variety of choices." The successor employer introduced specialized dishes from a more restricted menu. It also introduced very extensive changes in the decor of the restaurant and bar, in order to create its own unique atmosphere. However, the Board was of the opinion that the changes effected by the predecessor employer did not render its business substantially different from that conducted by the predecessor employer.

94. Having carefully considered all of the evidence and the submissions of the parties, we are of the opinion that the same is true in the circumstances of the present case. Although the retail food store at 1811 Avenue Road has been remodelled, repainted, and equipped with new signs so that it is now selling food and other grocery store items to the public under the Mr. Grocer trade mark rather than that of Dominion, it nevertheless remains a retail food store in which cashiers, clerks, meat cutters, department managers, and other employees use the same skills and abilities to perform essentially the same tasks that were performed by the persons previously employed by Dominion at that store. Moreover, in our opinion, the change from being one store in a chain of retail food stores to being one of a number of franchised retail food stores over which the franchisor is empowered to, and does in fact exert a substantial degree of direction and control, is not a change in the character of the business such that it is substantially different from the business which the predecessor employer carried on at those premises. We recognize that a literal interpretation of some provisions of the Collective Agreement, such as some of those referred to in paragraph 87 of this decision, might give rise to some difficulties for RPKC and the Union. However, we respectfully agree with the following views expressed by the Board in *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, in which the Board wrote, in part, as follows:

29. ... we do not think that we should lightly conclude that there has been a change in the "character" of the business simply because the transferred "part" operates in a new environment, in a somewhat different manner from the way it operated when it was part of the larger organization. This is to be expected of any severed "part", and it would be an unusual entrepreneur who did not initiate any new initiatives, or try to put his own imprint upon his recent acquisition. If a change in circumstances, or scale were sufficient to trigger section 55(5), there would be few sales of "part of a business" which could survive its application, and cases such as [*Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508; *Alcan Building Products*, [1968] OLRB Rep. May 213;

More Groceteria, [1980] OLRB Rep. April 46; and *Automatic Fuels Limited*, [1972] OLRB Rep. May 515] would have little significance.

30. Our attention was drawn to the alleged incongruity of applying the Vaunclair Purveyor's agreement to Vaunclair Meats, but we do not think the apparent inappropriateness of the collective agreement (which continues as a result of section 55) can be the governing factor in determining whether the business has changed its character. This automatic "flow through" of the predecessor's agreement will always create some transition benefit or hardship and a successor can as easily inherit a "cheap" agreement as a "rich" one. Indeed, this is one of the factors which should influence the price of the sale transaction. Moreover, every collective agreement negotiated for a "whole" will be more or less appropriate when applied to a part. Job descriptions may need to be modified, and some may be entirely redundant. Grievance procedures may be too simple or too complex. Contractual provisions respecting union stewards or safety committees may not fit well in the new circumstances. If the agreement provides a means for dealing with these issues, it must be followed. If it does not, then the employer can probably act unilaterally. In any event, we do not think it was intended that the Board should dispose of the collective agreement *and* the union's bargaining rights, simply because there might be problems in implementing a collective agreement.

31. Section 55(5) provides for the termination of bargaining rights only where there has been a *substantial* change in the character of the business occurring within sixty days of the sale. Both the language and the context suggest that this exception to the general rule is intended to be an exceedingly narrow one. The temporal limitation also suggests that section 55(5) should only be applied to exceptional situations in which a person purchases a business organization then turns it into something quite different operating in an entirely unrelated labour and product market (a restaurant into a bowling alley, for example; or a tavern into an emporium for oriental rugs). In those circumstances, the successor is unlikely to have any intention of retaining the predecessor's employees, and it would make little sense to impose upon a new group of employees doing substantially different jobs, the wages and conditions negotiated with an entirely unrelated predecessor....

Moreover, as indicated by the Board in the *Penmarkay* decision at paragraph 36, in circumstances where a part of a business has been sold that, by virtue of section 63 of the Act, carries with it the collective agreement that applied to the predecessor's entire business, "a strict literal interpretation of the collective agreement must yield to a common sense reading that takes account of the change in both the identity of the employer and the scope of the bargaining unit." We would also note that the potential difficulties that might otherwise flow from the continued application of the Collective Agreement to RPKC's franchise Mr. Grocer store at 1811 Avenue Road will be minimized in the present case by the Board's disposition of the Union's section 1(4) application, as set forth below.

95. For the foregoing reasons, the Board is of the opinion that RPKC has not changed the character of the business in question so that it is substantially different from the business of the predecessor employer, and is further of the opinion, in light of all the circumstances, that this is not, in any event, a case in which it should exercise its discretion under section 63(5) to terminate the Union's bargaining rights. In view of our conclusion in that regard, it is unnecessary to deal with counsel's contention that the Board has jurisdiction under section 63(5) to grant relief that is retroactive to the date of the sale.

96. As an alternative to the relief requested under section 63(5), counsel for RPKC asked the Board to declare that his client is not bound by any of the provisions of the Collective Agreement that relate to an ongoing relationship with Dominion. It is open to serious question whether the Board has jurisdiction to grant such relief under the Act. However, assuming without deciding that we do have such jurisdiction, the Board is of the view that it would not be appropriate to grant such relief in the circumstances of the instant case, particularly in view of our disposition of the Union's section 1(4) application, as set forth below.

97. We turn next to the Union's application under section 1(4) of the Act, which provides:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Three of the purposes of section 1(4) were summarized as follows in the *Penmarkay* decision:

40. Section 1(4) is designed to accomplish at least three purposes:

- (1) One objective is to prevent the erosion of bargaining rights. Take a case in which a union is certified to represent the employees of a firm; as soon as certification is granted, the proprietor redirects work to another enterprise. Treating both corporations as one employer preserves the union's bargaining rights. The large numbers of cases in this category include *Dominion Stores Ltd.*, [1978] OLRB Rep. Nov. 1013; *Radio Shack*, [1979] OLRB Rep. July 689; and *Great Atlantic and Pacific Company of Canada*, [1982] OLRB Rep. Mar. 386.
- (2) Section 1(4) also removes roadblocks to viable structures for collective bargaining. For example, on an application for certification, the Board may include the employees of two companies in a single unit. See *Walters Lithographing Company*, [1971] OLRB Rep. July 406 and *Diversey (Canada) Ltd.*, [1978] OLRB Rep. Sept. 814. For a case in which a related employer declaration was issued at the instance of management, see *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. Mar. 247.
- (3) Another function of section 1(4) is to ensure that the union representing employees is able to deal directly with the person or company possessing real economic control over them rather than with someone else who is their employer in name only. See *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176, and *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008.

Each of the three counsel who appeared before us in these proceedings acknowledged the legitimacy of those purposes in the context of section 1(4). However, their views differed substantially concerning the conclusion which the Board should reach in applying section 1(4), and the Board's jurisprudence concerning that provision, to the circumstances of this case. Counsel for the Union submitted that all of the elements of section 1(4) have been established in the present case and that the Board should exercise its discretion under that provision to preserve the "provincial" bargaining structure under the Collective Agreement. Counsel for RPKC and counsel for Dominion/Willet contended that their clients are not carrying on business under common control or direction, and that the Board should not grant a declaration (or any other relief) under section 1(4) in the circumstances of this case.

98. In *Penmarkay*, after listing the aforementioned three purposes, the Board referred to some of the jurisprudence which has developed under section 1(4), to indicate how those purposes illuminate the meaning of the criteria found in that provision:

41. These legislative objectives - preservation of bargaining rights, viable collective bargaining structures, and direct dealings between bargaining agent and the entity with real economic power over employees - illuminate the meaning of the dual criteria found in section 1(4). Consider first "common control or direction" in the context of an alleged erosion of bargaining rights. To construe this criterion as requiring a nexus through ownership would be to preclude the fulfillment of legislative objectives, as illustrated by *Evans-Kennedy Construction Limited*,

[1979] OLRB Rep. May 388. Mr. Kennedy was the major shareholder and active manager of Evans-Kennedy, a unionized general contracting firm. On Mr. Kennedy's advice, Ms. Potter, a close personal friend with no knowledge of the construction industry, incorporated a general contracting company called Celtic of which she became the sole owner; again at Kennedy's suggestion, Potter hired Evans-Kennedy's former field superintendent to be Celtic's general manager. Evans-Kennedy's personnel did all of Celtic's administrative work, accounting, purchasing and bid preparation, and Celtic utilized Evans-Kennedy's equipment. Kennedy decided what work Celtic would sub-contract and to whom; he also redirected one customer from Evans-Kennedy to Celtic. Evans-Kennedy was paid for its services by Celtic on a "cost plus" basis, but Ms. Potter was protected against any loss by an understanding that this payment would never exceed the amount Celtic received from a client. Celtic was owned by Ms. Potter. But the company was created at Kennedy's suggestion and served as a vehicle through which Evans-Kennedy operated union-free. The Board issued a section 1(4) declaration to preserve the bargaining rights that initially bound only Evans-Kennedy by extending them to Celtic. See also *Custom Insulation Ltd.*, [1979] OLRB Rep. June 531, and *Donald A. Foley Ltd.*, [1980] OLRB Rep. Apr. 436.

42. When the objective is to preserve bargaining rights in cases involving a parent company and a subsidiary, the "common control or direction" criterion has been interpreted not to require parental management of either the offspring's day-to-day affairs or its labour relations. The reason is obvious. A unionized parent company which sets general business policy for all members of the corporate family and reaps the rewards of their activities ought not to be allowed to circumvent bargaining rights by diverting customers to a non-union subsidiary. Two companies - a parent corporation and its wholly-owned subsidiary - were the subject of a section 1(4) declaration in *Dominion Stores Limited*, *supra*, even though a manager employed by the offspring was in charge of regular day-to-day decisions and there was no evidence of the parent being involved in the subsidiary's labour relations. The parent had advanced a start-up loan to the subsidiary, approved its capital plan each year, and reviewed its operating results on a quarterly basis; policy decisions on general business matters were made by a vice-president of the parent corporation. In *Diversey (Canada) Limited*, *supra*, there was no coordination of either the day-to-day management of operations of a parent company and a subsidiary - 60 per cent of which was owned by the parent - or the establishment and administration of labour relations policy at the two companies. Despite this separation, the existence of common directors, officers and financial control led the Board to conclude the statutory test was satisfied. See also *Radio Shack*, *supra*.

43. A company purporting to be the employer and another exercising overwhelming economic power over it have been treated as one in order to facilitate meaningful collective bargaining, even though there was no overlap in ownership. In *J. H. Normick Inc.*, *supra*, the union applied to be certified as bargaining agent for employees engaged in cutting and skidding timber in Midlothian township. The timber rights were owned by J. H. Normick Inc. ("Normick") and the cut trees were processed in its plants. Normick contended the cutters and skidders were not its employees. Each of them was party to a contract with Leo-Paul Turgeon who in turn was under contract to Normick. Mr. Turgeon hired them on the recommendation of Normick for whom they had previously worked. Normick paid Turgeon at a piece-rate and - without consulting him - fixed the piece-rate at which he paid the cutters and skidders. The count by which payment was made at both levels was verified by Normick. Normick supplied all equipment required by Turgeon and transported the skidders owned by the employees. For a time, Normick also provided supervisory and bookkeeping services. The contract between Normick and Turgeon could be terminated by either of them on thirty days notice. The Board found Turgeon to be under Normick's control.

44. This decision was followed in *Don Mills Bindery Inc.*, *supra*. This case arose out of a decision of Thorn Press Limited ("Thorn Press"), a company offering a full range of printing and related services, to close its bindery department. The bindery foreman on his own initiative, incorporated Don Mills Bindery Inc. ("Don Mills"), rented from Thorn Press the space previously occupied by its bindery department - on a month-to-month lease - and hired its former employees. He used the equipment owned by Thorn Press - valued at \$250,000 - rent-free at its pleasure. Thorn Press had previously performed 90% of its bindery work on its premises; Don Mills did 80% of this work. Binding for Thorn Press constituted more than 90% of Don Mills' business. Don Mills was paid for this work at competitive rates - less a 5% service charge in lieu

of rent for the use of Thorn Press' equipment. In this case, unlike *J. H. Normick Inc.*, there was no evidence that anyone except the nominal employer was directly involved in hiring employees or in determining their terms and conditions of employment. However, Thorn Press was held to exercise effective control over Don Mills. The Board stressed the high percentage of Don Mills' work done for Thorn Press, the use of its premises and equipment, and its ability to terminate the arrangement on short notice. In neither of these cases was a section 1(4) declaration necessary to preserve bargaining rights. The union in *J. H. Normick Inc.*, had none for the township in question. In *Don Mills Bindery Inc.*, the union had been certified to represent the employees of Thorn Press, but the Board noted these bargaining rights could have been preserved by finding a sale of a business to have occurred. The purpose of a section 1(4) declaration in both cases was to bring about collective bargaining between employees and the entity exercising real economic control over their working lives.

45. The "associated or related activities" test has also been liberally construed. When bargaining rights are at risk, firms have been found to meet this standard on the grounds that they served the same market. Two companies were found to be engaged in "associated or related activities" in *Valdi Inc.*, [1979] OLRB Rep. Aug. 833 because both sold groceries to consumers. See also *Evans-Kennedy Construction Limited*, *supra*. This interpretation recognizes that bargaining rights are eroded by shifting customers from one firm to another - even though there is no interchange of employees between the two or any integration of their production processes.

46. This criterion has been applied in a different way when the objective is to foster direct dealings between a union and the entity with real economic power over them. In *J. H. Normick Inc.*, *supra*, Normick's wood processing plants were found to be "associated or related" to Turgeon's tree cutting and skidding operation because the two businesses were functionally integrated, one supplying raw material for the other. The Board recognized that two firms need not produce the same product for one to effectively control the other.

99. In *J. H. Normick*, *supra*, the Board wrote, in part, as follows:

21. Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control or related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See *Zaph Construction Ltd.* [1976] OLRB Rep. Nov. 741 and *Ellwall and Sons Construction Limited* [1978] OLRB Rep. June 535.) In view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of *The Labour Relations Act*.

See also *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923; *Harley Transport Limited*, [1984] OLRB Rep. Oct. 1433; *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293; *The Charming Hostess*, [1982] OLRB Rep. April 536; and *Radio Shack*, [1979] OLRB Rep. July 689.

100. There can be no doubt on the facts before us that Willett and RPKC are corporations that are carrying on associated or related activities or businesses. RPKC operates a retail food

store under the Mr. Grocer trade mark and the other components of the franchise system provided by Willett, which is also the primary supplier of the products which RPKC sells to the public in the premises that it subleases from Willett, at which Dominion, Willett's parent company, previously operated a retail food store. Dominion created that franchise system in an attempt to remain a major player in the Canadian retail and wholesale food industry, through its subsidiary Willett.

101. Having carefully considered the able submissions of counsel and the totality of the evidence, we are also of the opinion that RPKC and Willett are carrying on those associated or related activities or businesses under common direction or control, within the meaning of section 1(4) of the Act. Mr. Ferencz controls some aspects of RPKC's business, such as staff levels, hiring and firing of employees, work assignments to individual employees, ordering of products, the store's hours of operation, and (subject to the maximum pricing provisions in the franchise agreement) the prices at which products are sold in the store. However, as detailed above, Willett also has a substantial degree of control over many aspects of RPKC's business. It controls the manner and timing of the way in which the advertising fee paid by RPKC and other franchisees will be applied toward the advertising and promotion of the Mr. Grocer concept. Willett has the right to inspect the premises and RPKC's methods of operations to ensure that they are maintained at a high level consistent with Willett's goodwill in the trade mark and consistent with the quality required by the franchise agreement. Under paragraph 12 of the franchise agreement, RPKC is obligated to carry on business in an efficient, reputable, and businesslike manner; to render courteous, efficient, and prompt service to the public; to keep the premises in a clean, healthful, and attractive condition; to require its employees to wear the uniforms specified by Willett and to ensure that those uniforms are kept in a clean and attractive condition and replaced when necessary; to maintain a balanced variety of merchandise having a total value of not less than \$200,000; to provide an adequate flow of financial information to Willett; to participate in such merchandising programmes as Willett deems appropriate from time to time; and to fulfill the various other obligations specified in that paragraph. Moreover, Willett has the power to control RPKC's sources of supply and the products to be supplied (as well as RPKC's sources of services and the services to be performed). Willett supplies the majority of the products that are sold by RPKC, and retains a broad discretion in respect of the prices that it charges for those products, and in respect of the proportion of the volume purchase discounts or rebates which it passes along to RPKC (and other franchisees). That discretion, combined with its power to determine the maximum selling price which RPKC can charge for each of the products sold in the store, gives Willett the power to affect RPKC's gross margins, which in turn has a direct bearing on its gross and net profits. Although Willett has not exercised all of its powers under the franchise agreement on a day-to-day basis, it has exercised many of them and retains the right to exercise the rest of them whenever it wishes to do so. In this regard, we note that paragraph 25 of the franchise agreement contains a typical "no waiver" clause, under which the failure of the franchisor at any time to require performance by the franchisee of any provision of the agreement does not affect the right of the franchisor to thereafter enforce such provision.

102. Having regard to the totality of the evidence and the submissions of the parties, we are of the opinion that RPKC and Willett exercise common direction and control over the associated or related activities or businesses which they have been carrying on at all material times. While not conclusive in themselves, the cumulative effect of the following facts provides further support for our conclusion that RPKC and Willett (and Dominion) fall within the purview of section 1(4):

- (1) The fact that Willett arranged with Dominion for Mr. Ferencz to be transferred to "Mr. Grocer responsibilities" from May 16 to July 9, 1983 so that he could obtain the experience and training outlined in Exhibit

- 12, while continuing to receive his normal salary and benefits from Dominion;
- (2) the fact that Willett, with the assistance of Dominion's lawyer, introduced Mr. Ferencz to the Toronto-Dominion Bank to place him in a position where he could, if necessary, borrow funds from that institution at an interest rate approximately half a percent above prime;
 - (3) the fact that Willett arranged to provide RPKC with \$50,000 in financing pursuant to a promissory note with very favourable interest provisions, including a provision under which no interest would be payable on any principal repaid before the 190th day;
 - (4) the fact that Willett provided Mr. Ferencz with an assurance that Willett would assist him if his legal fees concerning labour relations matters became burdensome, and renewed that assurance in the context of the instant case, which represented the first major labour relations expense that Mr. Ferencz had encountered in respect of the franchise;
 - (5) the fact that Willett paid all of the wages of the persons working in the 1811 Avenue Road store from July 6 to July 26, 1983;
 - (6) the fact that Willett arranged for RPKC to pay no rent for the premises and leased equipment during the first year of the franchise agreement, after which Willett anticipated that RPKC would be in a position to begin paying rent due to the reduction in wages and benefits that it anticipated would occur "after the location [was] decertified"; and
 - (7) the fact that the overwhelming majority of RPKC's employees were former Dominion employees, including Mr. Ferencz himself and most of the department managers.

103. The expert and other evidence which indicates that the various controls which Willett has over RPKC are "normal" in a franchise context does not assist the Board in deciding this case. The pertinent issue is not whether such controls are "normal", nor is it whether they are designed to serve legitimate commercial purposes such as the preservation of a trade mark. It is whether the existence of those controls is sufficient to support a finding of "common control or direction" within the meaning of section 1(4). In the circumstances of this case, we are satisfied that the existence of the controls described above does warrant such a finding. With respect to the "slippery slope" argument inherent in a number of the submissions that were made before us by counsel for the franchisor and counsel for the franchisee, we would note that in determining whether or not to declare that two (or more) corporations constitute one employer for the purposes of the Act, the question whether the discretion to do so exists in the circumstances of a particular case, and the question whether such a declaration ought to be made in those circumstances, are two distinct questions. Since the Board has a broad discretion under section 1(4) of the Act, a finding that associated or related activities are being carried on by more than one legal entity under common control or direction does not automatically result in the Board granting relief under section 1(4). Thus, as the Board noted in its recent decision in *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9, at paragraph 102, "it is not particularly helpful to test the reasonableness of a proposed interpretation of the phrases 'associated or related activities or businesses' and 'common control or direction' by asking whether that interpretation could embrace circumstances in which a declaration ought not to be made. In giving the Board a discretion whether to make or not to make

a declaration when the preconditions it specified had been made out, the Legislature recognized that there could well be circumstances in which 'associated or related activities or businesses' are carried on by two or more entities 'under common control or direction' without there being any valid labour relations reason for treating the two entities as constituting one employer for purposes of the Act." (See also *Harley Transport Limited*, *supra*, and *Ethyl Canada Inc.*, [1982] OLRB Rep. July 998.) Thus, we are not troubled by the possibility that the extensive controls which Mr. Karp's expert evidence suggests are to be found in many franchise agreements may be sufficient to bring the parties to those agreements within the purview of the phrase "common direction or control" in the context of section 1(4) of the Act. There is nothing in section 1(4) or any other provision of the Act which suggests that the Legislature did not intend franchise arrangements to fall within the potential ambit of a section 1(4) declaration. Moreover, the granting of relief under section 1(4) in the context of a case such as the present one, which involves a franchise granted in respect of a pre-existing retail food store for which the Union has held bargaining rights for a number of years as part of a broadly-based bargaining unit in the retail food industry, would certainly not dictate that such relief be granted in differing circumstances that might be present in other franchise contexts, notwithstanding the fact that the degree of control exercised by the franchisors over the franchisees in such other contexts might well constitute "common control or direction" within the meaning of section 1(4). For example, we are not called upon and do not intend in the present case to express any view concerning the appropriate disposition of a section 1(4) application pertaining to a franchise granted to an independent retailer with an existing non-unionized business, or a franchise granted by a franchisor unrelated to an existing unionized business. Questions concerning the application of section 1(4) in those and other franchise circumstances are best left for adjudication on a case-by-case basis in light of all the pertinent facts and labour relations policy considerations.

104. Counsel for the franchisor and counsel for the franchisee both urged us to adopt the approach that has been taken by the National Labour Relations Board in respect of franchises in such cases as *Speedee 7-Eleven* (1968), 170 NLRB 1332, and *S. G. Tilden Inc.* (1968), 172 NLRB 752. In those cases the NLRB has adopted the view that the critical factor in determining if a joint employer relationship exists is whether one party exercises direct control over the labour relations policy of the other. While that is no doubt a relevant consideration in the context of section 1(4), it is by no means the only relevant consideration. Thus, we respectfully decline to follow the unduly narrow approach that the NLRB has adopted in this area, as we are of the view that it is based upon a distinction between control of labour relations and general economic or contractual control that is unwarranted in the context of section 1(4). In this regard we share the view expressed by the majority of the panel that decided the *Penmarkay* case (in paragraph 58 of the majority decision):

Turning to the American scene, we are not inclined to follow in the footsteps of the National Labour Relations Board. As there is no analog to section 1(4) in the *National Labour Relations Act*, an "alter ego" doctrine has been fashioned by the Board to pierce the corporate veil, as an interpretative gloss on the statute. See Morris (ed.), *The Developing Labour Law* (Washington: Bureau of National Affairs, 1983), at 934-740. For obvious reasons, an administrative agency may be reluctant to extend very far a concept developed without legislative approval. Moreover, we believe the National Labour Relations Board, in the cases cited above, has drawn a false dichotomy between control of labour relations and general economic control. The latter often entails the former as this Board recognized in the other cases discussed above.

105. We also share the disinclination of the majority of that panel to follow the British Columbia Labour Relations Board decision in *Victoria Dodge*, [1980] 1 Can LRBR 37. In that case, the BCLRB concluded that "the considerable but nevertheless ultimately imperfect kind of control and direction" which a franchisor has over a franchisee that can terminate its relationship with the franchisor on thirty days' notice was not sufficient to justify a finding that they were under common control or direction under the British Columbia equivalent of section 1(4). We do not read section 1(4) as requiring that there be "perfect" control of one corporation over another

before they can be found to be under common control or direction. Moreover, we are of the view that the proper focus under section 1(4) in the context of a franchise agreement is the control or direction that exists while the franchise agreement is operative, rather than the control or direction that might or might not exist if that agreement were to be terminated by either party. In this regard, we note that the franchise agreement between Willett and RPKC had been in force for over a year and a half as of the final day of hearing of this matter. Moreover, there was no suggestion in the evidence that either RPKC or Willett intend to terminate it. Indeed, the evidence indicates that Mr. Ferencz sought to obtain a five-year franchise agreement, and was prepared to abandon his pursuit of a Mr. Grocer franchise unless the one-year term offered by Willett was extended to at least two years. Thus, we respectfully agree with the majority decision in *Penmarkay* (paragraph 52) that “the life of the franchise” is the appropriate “temporal frame of reference” in a case of this type.

106. Having concluded that RPKC and Willett (and, in view of the aforementioned admission, Dominion) are carrying on associated or related activities or businesses under common direction or control, we must now consider whether this is an appropriate case in which to exercise our discretion under section 1(4) to treat them as constituting one employer for the purposes of the Act. After carefully reviewing all of the evidence and the submissions of the parties, we have concluded that it is. As noted above, it is common ground among the parties that section 1(4) is designed to prevent the erosion of bargaining rights, to remove road blocks to viable structures for collective bargaining, and to ensure that the trade union representing employees is able to deal directly with the person or company possessing real economic control over them. In the present case, the Union, through what Mr. Collins described as “some very hard bargaining”, succeeded in consolidating over forty separate bargaining units into a single bargaining unit in a collective agreement that covered over two-thirds of Dominion’s Ontario stores, including the 1811 Avenue Road store. In an attempt to become more competitive in the market place, Dominion, through its subsidiary Willett, converted a number of those stores into Mr. Grocer franchises. However, as noted above, Dominion, through Willett, has retained a substantial degree of control over those stores and has placed itself in a position where it can maintain a presence in the retail food industry through those franchised stores, enabling it to continue to attempt to earn profits from retail food sales by a number of means, including royalty fees, advertising fees, income from wholesale products supplied to franchisees, and ECR’s retained in whole or in part on the products supplied to franchisees by RPKC or by authorized direct suppliers. Under those circumstances, we are of the opinion that it is eminently appropriate for the Board to exercise its discretion under section 1(4) for the purposes of preserving the Union’s bargaining rights in the form of the broadly-based bargaining structure which it succeeded in obtaining from Dominion at the bargaining table. In this regard, it is not without significance that while enhanced prospects of decertification of the Union may not have formed any part of Dominion’s motivation for embarking on the franchise programme, it clearly was a factor that was given considerable weight by Willett, through Mr. Ashton (who was one of Willett’s two key personnel at the material time), in the implementation of the franchise programme. Moreover, it is evident that Mr. Prittie, Willett’s Franchise Manager, counselled some prospective franchisees (other than Mr. Ferencz) concerning decertification, and used decertification as a selling point in his dealings with them. In the case of Mr. Ferencz, a question concerning decertification was raised early in his franchise discussions with Willett and he was advised to seek outside advice. Since Mr. Ferencz’s evidence concerning what Mr. Blair told him was quite vague, and none of the other persons in attendance at that meeting was called to testify in these proceedings, there is a dearth of reliable evidence concerning what Mr. Ferencz was told in this regard by Dominion’s former Director of Labour Relations. However, as noted above, there is nothing in the evidence before the Board to suggest that Mr. Ferencz lost interest in having the Union decertified.

107. A further valid labour relations rationale for issuing a section 1(4) declaration in the present case is that it will bring Dominion/Willett to the bargaining table along with RPKC (and such other Mr. Grocer franchisees as may ultimately be found (or agreed by the parties) to fall within the purview of section 1(4)), thereby giving the Union access to the real locus of power in respect of the many aspects of RPKC's operation over which Willett (and through it, Dominion) has ultimate control by virtue of the terms of the franchise agreement, which have a significant bearing on the wages franchisees can afford to pay to employees, and on other factors which influence terms and conditions of employment. With Dominion and Willett at the bargaining table, the Union will have an opportunity to attempt to persuade the franchisor to expand the franchisee's gross margins (by, for example, reducing its wholesale prices, passing on a greater proportion of ECR's, or reducing its advertising fee). Collective bargaining with those players at the table will also provide an appropriate forum for discussion of the Dominion Pension Plan, the Ontario Retail Employees Dental Benefit TrustFund, and the group insurance benefits available through packages offered to franchisees by Willett (through the aforementioned insurance company).

108. Accordingly, the Board, in the exercise of its discretion under section 1(4), will treat Dominion, Willett, and RPKC as constituting one employer for the purposes of the *Labour Relations Act*. Since the parties have agreed that we should remain seized to deal with any remedial matters on which the parties are unable to reach agreement, it is unnecessary to determine at this stage of the proceedings whether any relief other than a declaration should be granted under section 1(4).

109. The conclusion that we have reached in respect of section 1(4) and section 63(5) is similar to that reached by the majority of the panel which decided the *Penmarkay* case. This should not be surprising to the parties, or to the labour relations community, since although there are some relatively minor factual differences between that case and the instant case, the cases are not materially different. It is self-evident that labour relations stability is best served when like cases are decided in like fashion, particularly where, as in the present case, two of the three parties before the Board are the same as the parties that were before the Board in the earlier case, in which the Board provided a detailed, carefully reasoned decision that was clearly intended to serve as a guide to the parties, and to other panels of the Board, in respect of future cases involving similar facts. Counsel for RPKC and counsel for Dominion and Willett submitted that *Penmarkay* was wrongly decided. However, we find no merit in that submission.

110. The panel which decided *Penmarkay* found it unnecessary to deal with the Union's section 89 complaint in that case because its disposition of the section 1(4) application made the section 89 complaint "largely superfluous from a remedial point of view". However, in the present case, the parties agreed that we should decide the three matters before us on their merits, and in the event that the Union was successful in its section 1(4) application or its section 89 complaint, remain seized to deal with any remedial matters on which the parties are unable to reach agreement. Moreover, counsel for the Union noted that his client's section 89 complaint had been "re-litigated from scratch" in the present proceedings, and urged us to decide it so that the Union, Dominion, and Willett will be in a position to assess the numerous other cases arising out of the Mr. Grocer franchise programme that are awaiting adjudication by the Board. Since we recognize that a decision concerning the instant section 89 complaint may be of some assistance to the parties in resolving those other matters, we are prepared to provide them with such a decision.

111. Having regard to all of the evidence and the submissions of counsel, we are satisfied that Dominion's decision to close 110 of its retail stores, including the 1811 Avenue Road store, was made solely on the basis of economic considerations untainted by anti-union animus. In this regard, we note that Mr. Blair's and Mr. Toma's sharing of confidential information concerning

those closings with Mr. Collins in November and December of 1982 is inconsistent with anti-union motivation. We are further satisfied that Dominion's decision to embark upon a franchise programme through Willett was also untainted by anti-union considerations. In this regard, we accept Mr. Gee's evidence that decertification was never a consideration in the decision to embark on a franchising programme. The fact that the Company met with Union officials and attempted to negotiate collective agreement revisions in respect of the Mr. Grocer franchise programme is also inconsistent with the decision to embark upon that programme being motivated, in whole or in part, by a desire to rid those stores of the Union. However, it is clear that management was of the view that they would be unable to make a success of the Mr. Grocer franchise programme without substantial modifications to the Collective Agreement. When it became apparent that the Union was not going to agree to such changes, some of the persons responsible for the implementation of the franchise programme began to view decertification as one of the means by which franchise stores could become economically viable. Thus, decertification became an important element in the implementation of the franchising programme. As indicated above, Mr. Ashton prepared pro formas, including those provided to Mr. Ferencz in respect of the 1811 Avenue Road store, on the basis that the Union would be decertified after the Collective Agreement expired. The decision to charge RPKC no rent for the premises or the equipment leased to it by Willett was also based on that assumption, which led Willett to predict that wage and benefit costs would fall by 2-1/2% after the unit was decertified. Decertification was also one of the assumptions on which the aforementioned 1983 Mr. Grocer budget was based. Although Mr. Bletsoe may not have been as sanguine about the franchisees' decertification prospects as were Mr. Ashton and Mr. Prittie, he conceded in cross-examination that decertification "was a consideration" and "was contemplated in some stores". Although there is no evidence that Mr. Bletsoe discussed decertification with any of the prospective franchisees except in the context of informing them of the percentage that was necessary to obtain decertification (under section 57 of the Act) and suggesting that they obtain independent advice concerning labour relations matters, it is clear that Mr. Ashton and Mr. Prittie both contemplated that decertification would occur, and that Mr. Prittie counselled at least some of the prospective franchisees (other than Mr. Ferencz) accordingly. Indeed, as indicated above, Mr. Prittie went so far as to use the prospects of decertification as a selling point in his dealings with prospective franchisees. Moreover, although the aforementioned store closings had resulted in the layoff of a substantial number of employees, neither Dominion nor Willett took any steps whatsoever to direct or encourage franchisees to hire or recall those employees pursuant to their recall rights under the Collective Agreement, which Dominion and Willett's management team knew to be binding upon RPKC and the other Mr. Grocer franchisees by virtue of the successorship provisions of the *Labour Relations Act*. Mr. Ferencz made it clear to Willett from the outset of their franchise discussions that he intended to hire a number of family members. However, no one from Willett or Dominion made any suggestion to him that such actions might violate the Collective Agreement or the *Labour Relations Act*. Indeed, as noted above, it is clear from the totality of the evidence that Dominion and Willett, through Mr. Bletsoe and Mr. Ashton, intentionally left Mr. Ferencz with the impression that he would be at liberty to hire whomever he wished to staff the store, and that he would not be obligated to recall or hire laid off Dominion employees. In the circumstances of this case, it is reasonable to infer that Dominion and Willett adopted that approach in furtherance of the anticipated decertifications about which at least some prospective franchisees were being counselled. Thus, we find that the implementation of the franchise programme was tainted by anti-union motivation and involved contraventions of sections 64 and 66 of the Act by Dominion and Willett. Moreover, by permitting persons to be hired at the 1811 Avenue Road store without regard to the recall rights of laid off employees, Dominion and Willett breached the Collective Agreement and thereby contravened section 50 of the Act.

112. Thus, we have concluded that the implementation of the franchise programme was tainted by anti-union motivation to the extent described above, and we have further concluded that

the conduct of Dominion and Willett contravened sections 50, 64, and 66 of the *Labour Relations Act*. In reaching this conclusion, we find no merit in the argument of counsel for Dominion and Willett that the Board's decisions in *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861, and *Daynes Health Care Limited*, [1984] OLRB Rep. Aug. 1091, are wrongly decided, and that only the collective agreement is transferred from the predecessor to the successor, not the employment relationship which, counsel argues, was not assignable from one employer to another at common law and, therefore, was terminated by the sale by operation of law. That position is inconsistent not only with this Board's jurisprudence, but also with the approach that has been adopted by the Supreme Court of Canada in decisions such as *McGavin Toastmaster Limited v. Ainscough* (1975), 54 D.L.R. (3d) 1, and *Syndicat Catholique des Employes des Magazins de Quebec Inc. v. Compagnie Paquet Ltee* (1959), 18 D.L.R. (2d) 346. In our view, the legal effect of section 63(2) is correctly described in the following passage from *Emrick Plastics Inc.*, *supra*:

18. We conclude ... that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction *without hiatus*, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement during their tenure with the predecessor employer. We agree with counsel for the respondent that the purchaser takes the business *exactly* as he receives it from the vendor. Even if, for example, employees have been given notice of termination by the vendor, the purchaser is no more entitled to start that business up without regard to the recall rights of employees under the collective agreement than the *vendor* would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or a lay-off.

See also *Daynes Health Care Limited*, *supra*, in which the Board wrote, in part, as follows:

35. When Daynes acquired the business, it stood precisely in the shoes of its predecessor. It inherited an established complement of employees with established contractual rights. *Some of these employees were on layoff and had recall rights which they could assert before there could be any new hires.* More importantly, there was a much larger group of employees who had been actively employed right up to the date of the sale. Those employees were not, and could not have been, terminated without just cause - which cause could not be based solely on the impending sale. Nor could they be "laid off" from their jobs when those jobs and their work continued. If it were otherwise, the purpose and intended effect of section 63 would be substantially undermined. Employees with years of service and a legal stake in the predecessor's business could be cast aside by the simple expedient of having the predecessor employer purport to terminate them prior to the sale and having the successor pre-assemble a work force of "new" employees with no established contractual claims (e.g. seniority) and no previous contact with the union. It does not take much imagination to foresee the likely result of packing the bargaining unit with strangers adverse in interest to both the union and the predecessor's employees who could rely upon their seniority in the competition for scarce work opportunities. In practice the protections of section 63 would be illusory and short lived. As the Board put it in *Emrick*: could the Legislature have intended a continuation of the union's bargaining rights for a group of employees and the continuation of the employees' collective agreement, but not those employees' own right to continued employment in accordance with the terms of their agreement? Could the Legislature have intended the preservation of bargaining unit rights in the abstract, but not the protection of the positions of the members of the bargaining unit who might be able to benefit from or exercise those rights? Certainly that would be a perverse result and one which we would not lightly embrace. This is not to say that a successor employer cannot reorganize its work force, introduce new methods, or even trim the employee complement - provided it does so in accordance with the terms of the collective agreement. But the successor's rights are limited in precisely the same way as the rights of the predecessor.

[emphasis added]

Moreover, our declaration under section 1(4) that Dominion, Willett, and RPKC constitute one

employer for the purposes of the *Labour Relations Act* deprives that argument of any merit which it might otherwise have, in that a transfer of an employee from Dominion to RPKC would not be the assignment of an employee from one employer to another, but rather merely the transfer of an employee from one part to another part of the joint employers' operations.

113. If we are wrong in our conclusion concerning Dominion's and Willett's motivation for taking no steps during the implementation of the Mr. Grocer franchise programme to ensure that the Dominion employees who were on layoff were afforded their recall rights under the Collective Agreement, their conduct nevertheless remains a breach of section 50. Since Dominion, Willett, and RPKC constituted a single employer for the purposes of the Act at all material times, RPKC's Mr. Grocer store remained part of the bargaining unit covered by the Collective Agreement, under which Dominion (and Willett and RPKC) as their employer had recall obligations, the breach of which violated section 50 of the Act: see, generally, *Maple Leaf Taxi Company Limited*, [1982] OLRB Rep. Nov. 1671, and *Carroll Electric (1982) Limited*, [1983] OLRB Rep. Aug. 1282.

114. We are also satisfied on the balance of probabilities that RPKC has contravened sections 50, 64, and 66 of the Act. As noted above, although Mr. Ferencz was aware at all material times that RPKC was bound by the Collective Agreement and legally obligated to honour it, he chose to entirely disregard its provisions in staffing the 1811 Avenue Road store. Instead of recalling employees by seniority in the store's seniority area, he hired a number of family members and former Dominion employees to staff the store without regard to seniority or recall rights. Having regard to all of the evidence, we find that at least part of his and, therefore, RPKC's motivation in that regard was his desire to have the Union decertified in respect of that store, a goal which could obviously be more readily attained if the store was staffed by employees, hand-picked by Mr. Ferencz, who would be adverse in interest to Dominion's laid off employees (wishing to rely upon their seniority in the competition for scarce work opportunities), and to the Union (which would be bound to assist the laid off employees in asserting their seniority rights under the Collective Agreement).

115. As indicated in paragraph 14 of this decision, we have found it unnecessary to apply section 89(5) of the Act in deciding the Union's section 89 complaint. The evidence before the Board concerning that complaint was not equally balanced; the preponderance of the evidence clearly supports our findings in respect of the aforementioned contraventions of sections 50, 64, and 66 of the Act by Dominion, Willett, and RPKC.

116. For the foregoing reasons the Board hereby finds and declares that Dominion, Willett, and RPKC constitute one employer for the purposes of the *Labour Relations Act*. We further find and declare that Dominion, Willett, and RPKC have contravened sections 50, 64, and 66 of the Act in the manner described above.

117. Having regard to the aforementioned agreement of the parties, and to the Board's powers as master of its own procedures, the Board will remain seized of these proceedings to deal with any remedial matters on which the parties are unable to reach agreement.

DECISION OF BOARD MEMBER J. W. MURRAY;

1. I cannot agree with my colleagues in their decision in File No. 2883-83-R, which is an application under section 1(4) of the Act. I do *not* believe that RPKC and Dominion/Willett are under common control or direction as there is much evidence to show that they are not.

2. RPKC admits there has been a sale of a business or part thereof. Dominion and Willett agree. A sale under section 63 must mean that the new owner (in this case RPKC) inherits also the

Union contract, even though that contract may not be practically feasible in every respect since some of its clauses may be inappropriate under the method of organization and style of operation of the new owner. By the same token, the Union may not find everything to its liking under the new owner. In this instance it may well have to negotiate a new contract with RPKC alone. I find little merit in the statement by Mr. Collins that Union officials might be required to be “running around the province spending [their lives] in collective bargaining sessions”. Surely the Union’s major concern should be the retention of bargaining rights, not the work involved in contract negotiating.

3. Dominion had decided to sell or close many of its stores since it was in serious economic difficulty in the retail grocery business. This has been adequately shown to be the case. It should be noted that Dominion seems to have had little experience or expertise in the wholesale end of the business. In order to get this they purchased a significant share of Willett, and caused Willett to establish operations in Ontario. The viability of Willett depended on getting significant volume at the wholesale level. With other major competitors having their own systems, Willett initially had to obtain its business largely from independent outlets such as restaurants, hotels, cafeterias, and non-aligned independent operations. A clientele based on franchised independent operations was the method selected to ensure a greater, more predictable sales volume. As a result of supplying those outlets with products, it was expected that a large enough volume would be generated to make Willett competitive at the wholesale level, and to enable the independent franchise holder to be competitive at the retail level.

4. I believe my colleagues have taken the reporting requirements under the franchise agreement to be tantamount to control by the franchisor. It was adequately shown that this franchise agreement does not vary to any significant degree from hundreds of other franchise agreements. The reporting is for information purposes only, not for control. The majority has also drawn implications from the pro forma statements which, in my opinion are wholly unwarranted. These are only estimates; indeed, the disclaimer which Mr. Ferencz signed makes it very clear that this is so, and that the profit (or loss) indicated is not to be relied upon as a fact. The losses are his and his alone. The profits, if any, are his also. All suppliers, to some extent, control their retailers’ gross margins. Costs are very important, but the retailer has no margin until he makes a sale. The selling price, in the highly competitive grocery market, is in the long run set by the marketplace. RPKC has some freedom to purchase from other suppliers, both approved and unapproved, and indeed does so. The quality, cleanliness, image, etc., of the Mr. Grocer franchise, as handled by a large and varied group of independent franchisees, is of course of concern to the franchisor. The franchisor wants to establish a certain image with the public and to encourage franchisees to maintain that image. If a franchisee fails to do so, the franchisor has the right to cancel the franchise. By the same token, if RPKC is dissatisfied, it can end the arrangement on thirty days’ notice.

5. The estimated labour cost of 10.5% of sales in the first year covered by the pro formas, and of a lesser percentage in subsequent years, has been tied to only one assumption, that of Union decertification. My colleagues seem to make the assumption that this automatically would mean a reduction in the wage rates from those in the existing labour agreement. I suggest the reduction of labour costs *stated as a percentage of sales* can be affected by other factors, such as increased sales volume, more efficiency, and even a reduced staff, but there is no indication that this was considered or given much credence.

6. In any franchise start-up, it is important that the franchisor know the problems of the franchisee. The Markham store was an attempt to do this. Certainly there is great merit in having the early franchisees be as successful as possible. It is not uncommon to have differing arrangements with early franchisees. This was supported by the expert evidence of Mr. Karp. The conclu-

sions that seem to be drawn from the fact that some of the franchisees were ex-Dominion employees are, I think, incorrect. The position taken that these people were merely transferred from one Dominion operation to another is not justified. One must remember that Mr. Ferencz was *not* approached by Dominion or Willett to be a franchisee. Indeed, just the opposite is true; Mr. Ferencz learned about the franchise opportunity from a notice in a paper. It would appear desirable, from the franchisor's point of view, to have the early franchises sold to people who have some experience in the grocery business. It would certainly enhance the opportunity for a successful operation.

7. In conclusion, I would find that the RPKC application under section 63(5) fails, as previous Board decisions would indicate. There has been a sale of part of a business. RPKC inherits the Union agreement. If there is evidence that there have been breaches of this agreement, then there are appropriate avenues open to the Union for redress.

8. Having found RPKC to be bound by the Union contract, I do not believe there can be any erosion of bargaining rights. There are no roadblocks preventing the Union from bargaining with RPKC, although some changes may be necessary and desirable in future agreements. The real economic power the Union must deal with is RPKC, *not* Dominion or Willett. A sale occurred, the owner is an independent entrepreneur, and the Union should deal with him. While it might be easier not to deal on a store-by-store basis, I think the application of the Union under section 1(4) should fail. Some of the precedents cited by my colleagues in support of their other conclusions are not, in my opinion, applicable to the facts of the case before us.

9. In regard to section 50, as mentioned earlier in my decision, if there are breaches of the agreement which has been inherited by RPKC, there are ways to handle this. Indeed, the evidence indicates that the Union has filed a number of grievances concerning alleged contraventions of the agreement. I would find there has been a breach of section 50 by RPKC, but not by Dominion or Willett. I would not find breaches of section 64 or 66 of the Act by RPKC, Dominion, or Willett on the evidence adduced in this case. There has been no intimidation, threats, or like actions, nor in my view has there been any interference with the Union's bargaining rights.

10. Accordingly, I would dismiss the section 1(4) application, as well as the application under section 63(5). I would allow the section 89 complaint against RPKC to the limited extent indicated above, and dismiss the balance of that complaint.

0624-86-R Canadian Union of Public Employees, Applicant, v. St. Joseph's Hospital and St. Joseph's Home, Respondents

Certification - Practice and Procedure - Related Employer - Parties to certification proceedings making joint request for related employer declaration - Affected employees entitled to notice and opportunity to be heard - Hearing unnecessary unless employees make statement of desire to make representations

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

DECISION OF THE BOARD; June 24, 1986

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken. The title of this proceeding is amended to name "St. Joseph's Hospital and St. Joseph's Home" as the respondents to this application.

• • •

[paragraphs 2-5 omitted: Editor]

6. Representatives of the applicant and respondents have advised the Board in writing that:

The parties hereto recognize that St. Joseph's Hospital and St. Joseph's Home are separate legal entities which carry on associated activities, but that for the purposes of this application for certification, it is appropriate that the Labour Relations Board, under section 1(4), treat St. Joseph's Hospital and St. Joseph's Home, the Respondents, as one employer.

This amounts to a joint application by the applicant and respondents for a declaration under subsection 1(4) of the *Labour Relations Act*. It would be inappropriate for the Board to grant such a declaration without giving affected employees notice of the joint application and an opportunity to be heard. Accordingly, notice of that application will be given in a form hereinafter prescribed. A hearing with respect to that application will be unnecessary if no employee submits a statement of desire to make representations in accordance with the requirements of the prescribed form.

7. In the circumstances, the Board directs that a pre-hearing representation vote be conducted among employees in a voting constituency defined by the bargaining unit description which appears in paragraph 3 of this decision. All employees of the respondent in the voting constituency on June 12, 1986, who have not voluntarily terminated their employment or who have not been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the applicant in their employment relations with the respondent.

8. The Board determines that July 14, 1986, shall be the terminal date for the joint application under subsection 1(4), and directs that the Registrar forward to the respondents notices in the form attached to this decision for posting by the respondents in accordance with the Registrar's usual direction in that regard.

9. The matter is referred to the Registrar.

Form 33

LABOUR RELATIONS ACT
NOTICE TO EMPLOYEES OF APPLICATION UNDER SUBSECTION 1(4) OF
THE ACT
BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

Canadian Union of Public Employees,
 — and —
 St. Joseph's Hospital and St. Joseph's Home,

Applicant,
 Respondents.

TO THE EMPLOYEES OF: St. Joseph's Hospital AND TO THE EMPLOYEES OF St. Joseph's Home and respondent

1. TAKE NOTICE that the applicant on June 16 1986, made an application to the Ontario Labour Relations Board under subsection 1(4) of the Act alleging that the respondents carry on associated activities and requesting that the respondents be treated as one employer for the purposes of the Labour Relations Act. (See attached decision.)
2. The terminal date fixed for this application as directed by the Board is the 14th day of July, 1986.
3. Any employee or group of employees affected by the application and desiring to make representations to the Board in connection with this application shall send to the Board a statement in writing of such representations which statement shall,
 - (a) be signed by the person making the statement or his representative;
 - (b) contain the names of the parties to the application;
 - (c) contain a return mailing address; and
 - (d) contain a concise summary of the representations.
4. The statement of desire to make representations shall be,
 - (a) received by the Board; or
 - (b) if mailed by registered mail addressed to the Board at its office, 400 University Avenue, Toronto, Ontario, M7A 1V4, it is mailed; not later than the terminal date shown in paragraph 2.
5. Unless a statement of desire to make representations is delivered or mailed to the Board in accordance with paragraphs 3 and 4 of the Board may dispose of the application without further notice to the employees,

6. AND FURTHER TAKE NOTICE that if required, the hearing of the application by the Board will take place at the Board Room, 400 University Avenue, Toronto, Ontario, at a date and time to be fixed by the Registrar.

7. THE PURPOSE OF THE HEARING is to hear the evidence and representations of the parties with respect to all matters arising out of, and incidental to, the application referred to in paragraph 1.

8. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

DATED thisday of June, 1986.
.....
Registrar

Ontario Labour Relations Board
1189 LR2 (7/81)
Reg. 546, R.R.O. 1980

1237-85-U Jeanne St. Pierre, Complainant, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. Local 444 and Chrysler Canada Ltd., Respondents

Duty of Fair Representation - Remedies - Unfair Labour Practice - Grievor discharged for alleged misappropriation of company property - Failure to investigate and communicate with grievor arbitrary conduct - Arbitration with jointly selected counsel directed - Tripartite board of arbitration inappropriate - Submission of grievance to sole arbitrator ordered

BEFORE: *Owen V. Gray*, Vice-Chairman.

APPEARANCES: *Edward Ducharme* and *Jeanne St. Pierre* for the complainant; *Larry Bauer, David Wilson, James Walsh, Fraser Gillis* and *Ernie Clayton* for the respondent International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, U.A.W. Local 444; *David Deluzio* and *Lou Bulat* for the respondent Chrysler Canada Ltd.

DECISION OF THE BOARD; June 6, 1986

1. On May 2, 1983, Chrysler Canada Ltd. (“Chrysler”) terminated the employment of Jeanne St. Pierre for alleged misappropriation of company property. She was then in her late forties, with approximately seven years seniority and an unblemished employment record. Officials of the respondent trade union filed a grievance with respect to Ms. St. Pierre’s discharge and pursued that grievance through all three pre-arbitration steps of the grievance procedure set out in the applicable collective agreement dated December 11, 1982 between Chrysler and the United Automobile, Aerospace and Agricultural Implement Workers of America and its Locals 444, 1090 and 1459. At each step, Chrysler refused to alter its position. The union decided not to refer the grievance to arbitration, and withdrew it in July, 1983. On August 8, 1985, St. Pierre filed this complaint, in which she alleges that in its representation of her the respondent union violated section 68 of the *Labour Relations Act*, which provides:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Chrysler was named as a respondent because it would be affected by the relief claimed in the complaint. Neither respondent argued that the complainant's delay in filing the complaint should lead the Board to dismiss it.

2. On April 30, 1983, while St. Pierre was working the afternoon shift in the paint shop at Plant 6, her foreman came to her and said that one of the plant guards wanted her to go with him to her car, which was parked in the employee parking lot. Other plant guards and police officers were standing around her car when she and the guard arrived there. She was told that plant guards had found the trunk of her car open. In the trunk were a master brake cylinder, two windshield wiper blades, a gas tank cover, approximately 36 spark plugs wires, and two large boxes containing components of a toilet. St. Pierre told those present that she had purchased the toilet at Beaver Lumber on her way to work. She denied knowledge of the automobile parts. She said that someone must have placed them in her trunk, as they had not been there when she had parked the car. She agreed that the guards could take those parts.

3. One of the plant guards then asked to look inside the passenger compartment of her car. She unlocked the doors for him. Inside the car were a new distributor cap, six ballast resistors, a windshield wiper time delay relay, a rear amplifier switch and a large pill bottle containing various fuses and other small electrical system components. She explained that the contents of the pill bottle had been in a plastic bag she had bought at a garage sale along with a rim which she had in the trunk. With the exception of the rear amplifier switch, she said the other parts had been obtained for her for use in her car, a Dodge Mirada, either by her son-in-law's brother, who is the manager of a Dodge dealership, or by a friend in Kingsville who operated an automobile repair shop and could obtain such parts at a discount. She did not then know where the rear amplifier switch had come from, and said so. (She later learned it had been bought by one of her children.) After hearing these explanations, the senior plant guard asked if he could "borrow" the items in the pill bottle and the rear amplifier switch. She agreed to let him borrow them.

4. Certain written reports apparently prepared by the plant guards who had been in attendance on this occasion were made exhibits during the subsequent testimony of one of the trade union's officials, as evidence of material he received from the company during the grievance process. The reports were not shown to St. Pierre during her cross-examination. She has never seen them. For the most part, these reports are consistent with St. Pierre's testimony. There are some inconsistencies between the explanations she says she gave for items found in the passenger compartment of her car and the explanations recorded in the written reports. To the extent those inconsistencies were put to her in cross-examination, she denied the versions recorded in these reports. None of the other participants in the meeting at St. Pierre's car on April 30, 1983 was called as a witness by any of the parties. To the extent that what actually happened on that occasion is relevant, I give no weight to the written reports as evidence of the truth of their contents where they contradict the evidence St. Pierre gave under oath.

5. After the meeting in the parking lot, St. Pierre returned to the line and completed her shift. She returned to work the following Monday afternoon, May 2nd. That day her shop steward, Tony Cattai, came and told her that management wanted to see her in the office about what had been found in her car. She had a brief discussion with Cattai before going into the meeting in the office, but does not remember much about that discussion. She had never been in the office before, and the meeting she went to in the office was "a blur" to her afterwards. With reference to

a document never put before the Board or seen by St. Pierre but said to be minutes of that meeting, the union's representative asked St. Pierre whether Cattai then said "she's is being set up", and she said that she thought he had said that. She could not recall whether the parts found inside the passenger compartment of her car were discussed at the meeting. She does remember that she was asked to sign a piece of paper but refused to do so on Mr. Cattai's advice. No other participant in this meeting was called as a witness by any of the parties.

6. Another shop steward, James Walsh, spoke to Ms. St. Pierre before the May 2nd meeting and again about five minutes afterwards. In the latter discussion, he told her to write out a "fact sheet." He explained in cross-examination that this is a standard procedure: "the employee makes their fact sheet and the shop steward makes his fact sheet." About a week later, St. Pierre wrote out and delivered to the union the following undated document:

FACT SHEET JEANNE ST. PIERRE

On or about the month of Aug. 1983 I have been getting phone calls. When I was on afternoon around 9 AM the phone would ring and I would let it ring up to 15 times sometimes as soon as I would answer the party would hang up. When I was on days most every night they would call. Sometimes 1 - 2 - 3 - up to 5 AM and say obscene things and if I would not answer they would let it ring 50 - 50 times so I got to put the answering machine on.

In November when we were on strike I left my house on a Sunday to play cards with a friend around 7:30 p.m. and to my return around 11:30 I found my car without any wheels on.

February the 18th the Doctor order me off of my feet for a blood cloth on my leg for two weeks. So naturally I went to florida while I was off. To my return I found my house was broke in and entered and set on fire.

On about Saturday April the 30th I was at work when I was call by the guard to go with them at my car. When I got there with the police and guard the trunk was open. They found wires. A big black thing and wipers which I dont know how it got there and how my trunk was open. Just prior to my going to work I had bought a toilette for my home at Beaver, and there was deffenetly nothing in my trunk back then.

When I got to work May the 2nd I was suspended.

"Jeanne St. Pierre"

P.S. My phone has been tap by the Windsor Police cause someone is trying to hurt me, this one of the ways by having lose my job.

I told the guard if someone put something in my trunk they will probaly follow me home to get it out.

7. After the May 2nd meeting, St. Pierre went to speak to Jerry Bastien, who was then first vice-president of Local 444. She told him what the company had found, how they had found it and so on, and he said he would get in touch with her. St. Pierre says Bastien spoke to her by telephone once after that to verify what had been found in her car. She made efforts to see him again, but he was always busy. She left her name and telephone number, but did not see or hear from Bastien again. In fact, she heard from no one on behalf of the trade union until July.

8. St. Pierre did not say, and was not specifically asked, precisely when she had met with Bastien. The suggestion that this meeting occurred on May 4, 1983, formed part of a long narrative put as fact to St. Pierre by the trade union's representative in cross-examination and denied by her as being inaccurate in other respects. It does seem likely that the meeting occurred within a few days of St. Pierre's termination on May 2nd. I am satisfied it must have occurred prior to May 16,

1983, when Fraser Gillis, St. Pierre's committeeman at the time of the incident and the person who actually launched the grievance on her behalf, dealt with management at step 2 of the grievance procedure.

9. At that step 2 meeting, Gillis was shown the written reports of the plant guards and photographs of certain items said to have been taken from St. Pierre's car. Gillis did not speak to St. Pierre before going to this meeting. He did not discuss the reports and photographs with her after the meeting. He never spoke to her about the grievance. The reason he gave for not speaking to her was that he had no telephone number for her and she had not contacted him. It is not apparent from the evidence how St. Pierre would or should have known to contact Mr. Gillis. Beyond looking through the material given to him by other union officials before going to the meeting, Gillis testified that the only effort he made to find a telephone number for Ms. St. Pierre was to ask whether there was one in the file that the Chrysler labour relations officer had, to which he says he received a negative answer. Gillis' awareness of and attitude toward Ms. St. Pierre's grievance is reflected in his statement in cross-examination that he had had her fact sheet, and had assumed that its contents were what she wanted presented and that she would have contacted him if she had any additional information. He explained that the third step in the grievance procedure would ordinarily be and was handled by someone else, who would ordinarily work from the file he passed on.

10. The person who handled Ms. St. Pierre's grievance at the third step was David "Red" Wilson, third vice-president of Local 444. At the time in question, Wilson handled about 1,000 grievances a year. Of these, between 115 to 200 involved discharges, about 100 of which would have been for failure to report within five days. The remainder would be based on threats, intimidation, insubordination and violation of various company rules. Wilson estimated that only about 15 of the grievances he handled each year would be concerned with discharges for misappropriation or theft.

11. Wilson testified that when he took over the file he received a telephone number for Ms. St. Pierre - one he understood had been obtained by Jerry Bastien - and made three or four attempts to contact her at that number starting in May. He had no success until July, by which time he had already had his third stage meetings with management and had withdrawn the grievance. Wilson was asked in cross-examination why he did not write a letter to Ms. St. Pierre when he was unable to establish contact by telephone. He said it was not his practice to write letters to grievors he was representing, even if he was unable to contact them by telephone. The union offered no rationale for such a practice.

12. When Wilson met with management at the third stage of the grievance procedure, he pointed out that St. Pierre could not be held responsible for possession of the items found in the trunk of her car because the trunk was open when the items were discovered by Chrysler's guards. Management then changed tack, and focused on the items found in the passenger compartment of St. Pierre's car. Wilson was concerned that he had no receipts or proofs of purchase to show for those parts. He withdrew the grievance under a provision of the agreement which permits the union to reinstate it within three months.

13. Wilson's telephone conversation with St. Pierre in July was the only contact Wilson had ever had with St. Pierre before the date of hearing of this complaint. In his cross-examination of her, the union's representative suggested to St. Pierre that Wilson had made specific reference in this conversation to Bastien's having asked her if she could produce receipts for the parts found in her car and to her failure to supply receipts and had said that unless she could come up with new evidence, her grievance would not be pursued. St. Pierre categorically denied that anyone had ever

asked her for receipts or any other proof of ownership with respect to the items found in the passenger compartment of her car. She did not recall Wilson asking her for new evidence. She did recall asking Wilson if she could see him personally, as the fire damage to her house was still being repaired and it was difficult for her to speak with him on the telephone. Her assertion that she had sought to discuss the matter further was not challenged in cross-examination or contradicted by Wilson, nor was her statement that when she went to his office and called him thereafter he was never available.

14. Wilson's own version of the telephone conversation is that he told St. Pierre that with the facts the union had it was impossible to go to arbitration, but if any new evidence emerged, he had ninety days within which to reinstate the grievance. He says she replied that she was being harassed and that he could check her statement with the Windsor police and fire departments and that the events she recited would support her position that someone else must have put those parts in her trunk. Wilson said he told her he would check that out. Significantly, Wilson did not claim to have asked St. Pierre for receipts or that he had mentioned to her that Bastien had made such a request. His evidence on this point was merely that he had been informed when the grievance was passed to him that St. Pierre had been requested to present the union with further evidence, namely receipts or proofs of purchase of the items in her car.

15. After the initial meeting of May 2, 1983, and in accordance with the practice of these parties and the terms of their collective agreement, Ms. St. Pierre was not present at any meeting at which her discharge was discussed by representatives of her union and of management. Her impression of the reason for her discharge was formed at the initial stages. She thought she had been discharged because Chrysler believed she had misappropriated the items found in the trunk of her car - the items which she said must have been put there by someone else. She did not attach any importance to the items found in the passenger compartment of her car, and made no reference to them in the "Fact Sheet" she prepared at that time at the union's request. From the evidence of both Gillis and Wilson, it is apparent that the main thrust of management's case up to the third stage of the grievance procedure was, indeed, that St. Pierre had misappropriated or participated in the misappropriation of the items found in her trunk. As Wilson acknowledged, however, the focus of the case shifted dramatically at the third stage, after any discussions with St. Pierre and before the decision was made to withdraw the grievance.

16. Wilson acknowledged in cross-examination that he had not confronted St. Pierre with the company's allegations concerning parts found in the passenger compartment of her car. He justified this by saying that St. Pierre had had an opportunity to explain her possession of those parts to Bastien. When questioned whether he had ever asked St. Pierre to share her views with the union's executive, Wilson replied that Ms. St. Pierre had been given an opportunity to share her views with Bastien. Wilson had no direct knowledge of the content of St. Pierre's discussion with Bastien - he was not present. When it was put to Wilson in cross-examination that St. Pierre thought the contents of the trunk were what was in issue when she had spoken to Bastien, he acknowledged that that was what had been in issue at that time.

17. Bastien was not called as a witness. When asked what had become of him, Wilson said he was a staff representative for the U.A.W. in Windsor. There was no suggestion that anything stood in the way of his testifying at the Board's hearing, which was conducted in Windsor. In the circumstances, Bastien was conspicuous by his absence.

18. Ms. St. Pierre heard nothing from Wilson after July 1983. In October 1983, she ran into Walsh at a local hotel and he told her her grievance had been withdrawn. In the first few months of

1984 she went to a lawyer who eventually wrote a letter saying she had no case. She sought out the firm now representing her in the early months of 1985. This complaint was filed in August 1985.

19. Ordinarily, as in this case, the collective agreement by which employees are bound does not give them the right to decide whether their grievance will be pressed to arbitration - that is exclusively for the trade union to decide. The *Labour Relations Act* does not require that a trade union carry a grievance through to arbitration merely because the grievor wishes that this be done. In making its decision whether or not to proceed to arbitration, the trade union's obligation to the grievor is that it must not act in a manner which is arbitrary, discriminatory, or in bad faith. These terms were described in *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, 6 CLRBR (NS) 134:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at this decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be "reasonable" (*Clifford Renaud*, [1976] 2 Can. LRB, [1976] OLRB Rep. Jan. 967, 22; *Jay Sussman*, [1976] OLRB Rep. July 349 11; *I.T.E. Industries Ltd.*, [1980] OLRB Rep. July 1001, 20), "not unreasonable" (*Ivan Pletikos* [1977] OLRB Rep. November 776, 3), "not to open to challenge" (*Oil Chemical & Automic Workers Int'l Union and its Local 9-698*, [1972] OLRB May 521, 3), or at least "not implausible" (*CUPE Local 1000 - Ontario Hydro Employees Union*, [1975] May 444, 32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers "patent" and arrives at an "almost perverse" understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from "directing its mind to the real question", and that in so doing it has acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, 22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *CUPE Local 2327*, [1981] OLRB Rep. June 623, 30; *Alvin Plummer*, [[1983] OLRB Rep. Nov. 1920, 5 CLRBR (NS) 108].

The Board has recognized that considerations relevant to a decision whether to press a grievance to arbitration include the merits of the grievance, the likelihood of its success, the financial commitment involved in proceeding to arbitration and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the arbitration proceedings and their possible results: see, for example, *Catherine Syme*, [1983] OLRB Rep. May 775 at 20 ff.

20. In *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, 5 CLRBR (NS) 107, the Board made these observations about the union's duty in a case in which a discharge grievance is abandoned:

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions gives discharged employees an absolute right to have their terminations reviewed at arbitration. (See Division V.7 (Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C. 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, P. *Reconcilable Differences*, (1980) pp. 137 ff.). In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

41. This Board does not view the language of section 68 of the Act as guaranteeing to every employee the arbitration of his or her discharge....

...

46. In our view, however, the law has evolved beyond the point where the union may simply assert that it has "considered" an employee's request for help and "decided" not to help him.

47. The decision not to process a grievance for an employee who has been disciplined or discharged may, depending on the circumstances, be a justified and responsible exercise of a union's prerogatives. Where, however, an employee has been discharged there is an obligation on a union to provide a satisfactory explanation for its decision not to process a grievance. While the legal burden in a section 68 complaint is on the individual complainant, *once it is established that a union member has suffered the ultimate sanction of discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration.*

48. The union's explanation in the instant situation that it did not grieve Plummer's termination because Plummer had received verbal warnings about his work performance and because none of his fellow employees would support him is inadequate because, as detailed above, the union did not ascertain from Plummer his side of the story. *The union cannot be said to have directed its mind to the merits of a grievance or potential grievance if it has not ascertained the grievor's version of the situation.*

[emphasis added]

21. In his examination of Wilson in chief, the union's representative did not directly ask Wilson why he had decided to abandon St. Pierre's grievance. He did ask Wilson "Would a person need six ballast resistors?" and "Would they require a pill bottle of fuses, [etc.], for the operation of their vehicle?", to which Wilson answered "no" in both cases. In the context of his other testimony, these questions and answers only highlight the inadequacy and superficiality of Wilson's investigation and consideration of the complainant's grievance. The importance Wilson attached to the ballast resistors is troubling, since it does not appear from the evidence before me that Chrysler treated the ballast resistors as stolen property. St. Pierre explained that she had obtained the six resistors from her son-in-law's brother or her friend in Kingsville because the ballast resistor in her

car kept blowing out - she had gone through three of them already. The plant guards seemed to accept that explanation at the time. It is most curious that Wilson would not. There is no suggestion that Chrysler offered the union any evidence other than the mere presence of the items in the car to support the theory that St. Pierre had stolen any of those items from Chrysler or obtained any of them from someone who had. There is no suggestion that Wilson knew of or was given by management any reason to suppose that the items found in the passenger compartment could not have been obtained, as St. Pierre says they were, from a Chrysler dealer or from an auto repair shop or, indeed, at a garage sale. The crux of Wilson's concern seems to have been that St. Pierre had never produced receipts or other proofs of ownership with respect to these items. Her uncontradicted evidence is that she was never asked to do so, by Wilson or anyone else. St. Pierre was not at the stage 2 and stage 3 meetings at which the employer revealed its case against her. She had no way of knowing that the focus of the dispute has shifted at stage 3 from the items in the open trunk to the items in her locked car. Even if I prefer Wilson's version of the July telephone conversation to that of St. Pierre, one thing remains critically clear: there is no evidence that the union ever asked St. Pierre to explain how she came to have the items found in the passenger compartment of her car or to respond to any specific allegation made to the union by Chrysler with respect to any of those items during the grievance process or to address the specific concerns which led the union's decision maker (Wilson) to decide that her grievance should not go to arbitration. In those circumstances, that decision was arbitrary and constituted a violation by St. Pierre's bargaining agent of section 68 of the *Labour Relations Act*.

22. The appropriate remedy for this kind of breach of section 68 is to direct that the grievance be reinstated and submitted for arbitration and that the employer party not raise any objection based on the earlier withdrawal or failure to meet collective agreement time limits: *Leonard Murphy*, [1977] OLRB Rep. Mar. 146, [1977] 1 Can LRRB 422; *Savage Shoes Ltd.*, *supra*, at 63ff; and see *Gerald Lucuyer*, [1985] OLRB Rep. July 1099 at 66-78. In the event the grievance is successful, the union's violation of section 68 and the complainant's delay in filing this complaint will have extended the period of time for which an award of compensation for lost earnings might be awarded by an arbitrator, and the employer should not bear any increased liability attributable to those causes. Fairness requires that the portion of that increase attributable to the union's breach should be paid by the union and that the portion attributable to the complainant's delay should be foregone by her. The translation of those principles into a formula applicable to the facts of a particular case is a matter on which there can be differences of opinion and approach. In this case, the respondents addressed a similar problem in the collective agreement in force at the time of the complainant's discharge. One of the letters of understanding which forms part of that agreement deals with circumstances in which the union decides, as a result of internal procedures, that it wishes to reinstate and continue processing a withdrawn grievance. The employer agrees to permit reinstatement, on terms that it will not be held liable for compensation with respect to the period prior to the date the grievance is reinstated. Having regard to that understanding between the respondents, the respondent employer's liability should be restricted to the period after the date of release of this decision. The union should be responsible for compensation awarded with respect to the period from the date of discharge to the date this complaint would have been decided had it been filed promptly. The Board will retain jurisdiction to determine that date if the need arises and the parties are unable to agree.

23. Because the union may be liable to pay compensation if the grievance succeeds at arbitration, the union's full-time employed representatives would have a conflict of interest in representing the complainant's interests at arbitration. Accordingly, the respondent union will be required to retain counsel jointly selected by it and Ms. St. Pierre to act in the union's name and at the union's expense to represent her interests at the arbitration of the grievance: see *Central*

Stampings Limited, [1984] OLRB Rep. Feb. 215 at 17 and *Central Stampings Limited*, [1984] OLRB Rep. Oct. 1383 at 8.

24. The collective agreement contemplates that grievances will be finally resolved by an appeal board consisting of an Impartial Chairman, one or two labour relations executives of Chrysler and one or two official representatives of the International Union. The Impartial Chairman's decision governs only if the union and employer representatives disagree. Because the union and employer have a similar financial interest in the failure of the grievance at arbitration, it would be inappropriate for the arbitration to be dealt with by a tripartite board of arbitration, particularly one in which the sidespersons are union and management employees. Another of the letters of understanding appended to the collective agreement incorporates a Special Arbitration Program, which provides for expedited submission to a single neutral arbitrator of grievances which, like this one, involve no question of interpretation of collective agreement language. In the circumstances, the respondents will be required to submit Ms. St. Pierre's grievance to a sole arbitrator. To the extent that the identity of that arbitrator is subject to the concurrence or control of the union, the union's power of selection will be exercised jointly by the union and the complainant.

25. In summary, the Board finds and declares that the respondent trade union acted arbitrarily in deciding to withdraw the complainant's discharge grievance, contrary to section 68 of the *Labour Relations Act*, and orders and directs that:

- (a) the respondents forthwith submit Jeanne St. Pierre's discharge grievance to arbitration by a sole arbitrator under the applicable collective agreement, and the respondent Chrysler shall not raise any objection based on the earlier withdrawal or intervening delay;
- (b) any control the respondent trade union may have over the identity of the arbitrator shall be exercised jointly by it and the complainant;
- (c) the respondent trade union shall retain counsel jointly selected by it and the complainant to act in its name and at its expense to represent the complainant's interest at and in connection with the arbitration of her grievance; and
- (d) in the event the grievance is upheld and the arbitrator makes an order for compensation, the respondent union shall pay the complainant the portion of that compensation referable to losses during the period between May 2, 1983, and the date on which this decision would have been released had the complainant acted promptly in filing this complaint and the complainant shall forego that portion of the award which is referable to the period from that date to the actual date of release of this decision.

The Board remains seized of this matter to resolve any dispute arising over the interpretation or implementation of these directions and orders.

3472-84-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada, Local 463, Complainant, v. Labourers' International Union of North America, Local 597 and **Steen Contractors Limited**, Respondents, v. Milne & Nicholls/Vanbots Joint Venture, Intervener

Jurisdictional Dispute - Practice and Procedure - Board issuing interim order on agreement - Complainant union seeking to withdraw complaint after project in question completed - Board denying consent to withdraw - Proceeding continued for adjudication of merits - Board's original decision amended

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *R. Wilson*.

DECISION OF THE BOARD; June 12, 1986

1. The Board's decision in these matters dated May 15, 1986 is hereby amended by deleting at the end of paragraph 18 the words "In the proceedings, it will be at risk of having the Board determine the dispute on the uncontested evidence of the other parties.". Paragraph 18 of the decision as amended will read as follows:

18. Accordingly, the Registrar is directed to schedule this complaint for a pre-hearing conference pursuant to the Board's Practice Note #15. The Ontario General Contractors Association is to be served with notice of the pre-hearing conference and may participate in it without prejudice to the right of any of the parties to challenge the Association's right to participate in the hearing into the merits of the complaint. In this respect, the parties are directed to set out their respective positions to the pre-hearing conference vice-chairman on the Association's status to participate in the hearing into the merits of the complaint.

0130-86-R Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 (AFL - CIO - CLC), Applicant, v. **Telkom Corporation**, c.o.b. Electronic Warehouse, Respondent, v. Group of Employees, Objectors

Bargaining Unit - Certification - Employee - Whether persons fully funded by external sources and subject to contractual restrictions "employees" - Source of funding only one criteria in determining status - Relationship of persons to employer's work force as whole major consideration - Individuals included in bargaining unit

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *F. W. Murray* and *D. A. Patterson*.

APPEARANCES: *Tom Kees*, *James Whyte* and *Roberto Peticca* for the applicant; *W. J. Hayter*, *B. A. B. Simpson* and *M. Teodorescu* for the respondent; *Pam Brundritt* and *Wayne Blake* for the objectors.

DECISION OF PATRICIA HUGHES, VICE-CHAIRMAN, AND BOARD MEMBER D. A. PATTERSON; June 19, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties are agreed that the bargaining unit should be described as

All employees of the respondent in the City of Windsor save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.
4. The parties disagree about the status of six individuals who perform work for the respondent. The applicant claims that they are employees who should be part of the bargaining unit. The respondent argues that they are not its employees. Neither party raised the possibility that any other entity might be the employer of these individuals.
5. The respondent has been in business for only a few months. Of its sixty-one employees, forty-eight are in some way subsidized by funding programs run by one of the three levels of government. Of the six disputed individuals, five are totally funded by a government program called the Futures Program, and the sixth is almost totally funded by a work activity program run by the City of Windsor. The other funded employees are partially funded by external sources and partially paid by the respondent. The respondent does not question the employee status of the partially subsidized employees, but argues that the six other persons are not its employees for the purpose of the *Labour Relations Act* because they are exclusively funded by the two different programs.
6. One of the six employees, George Thibert, is a recipient of municipal welfare assistance. As a condition of receiving welfare assistance, he must find work and to this end he has been hired by the respondent under a municipal work scheme (the "Windsor Program"). In addition to his welfare payments, he receives \$3.00 a day plus transportation costs. Under this city program, persons are hired for thirty days, a period which can be extended with the agreement of the municipality. Thibert has been under this program since February 24th, 1986 and is now in his third thirty-day period. Two other people who were on the Windsor Program are still employees of the respondent, but are now working under the Job Development Program, a one-year federal programme with no extensions. Thibert has been doing mainly odd jobs for the respondent, but there are no constraints imposed on the scope of duties which the respondent can assign to persons on the Windsor Program.
7. The other five disputed persons are under the Futures Program which is funded by the provincial government and run through St. Clair College ("the College") in Windsor. Persons between the ages of eighteen and twenty-four, who have graduated from grade 12 and who have been out of work for twenty weeks are eligible for the Futures Program. Under the Program, they take part in a three-day training workshop and then work for employers for a sixteen-week period. The respondent has engaged the services of eight Futures participants; three of them have "graduated" from the program and of these three, the respondent has hired two as "regular" employees. The other five are scheduled to work until sometime in May or June of 1986. No decision has been reached about rehiring any of these persons.

8. Under the Futures Program, the respondent, the College and the individual enter into a contract which sets out the obligations of each party. In the contract, the respondent is referred to as “the employer” and “the placement”, the individual as “the participant” and the Futures Program as the “delivery organization”. Any of the parties may terminate the contract. The contract requires the employer to provide the participant with employment experience, provide “adequate day-to-day supervision”, provide training with respect to tools or machinery, maintain an attendance record which is forwarded to Futures, and evaluate the participant. The employer is required to inform Futures about any accident or injury in order to comply with the *Workers Compensation Act* and to maintain third party liability insurance. If the employer changes the training given the participant, it must inform Futures. Three provisions of particular interest are numbers 7, 8 and 11:

- (7) Supplementation of wages is *not* allowed for participants while on the program.

[emphasis in original]

- (8) Since the program does not provide funds for overtime, the employer must ensure that the participant does not work more than the agreed upon weekly hours as stated in the employer application and training plan.

- (11) The employer will ensure that no regular full-time or part-time employees are displaced in any way by the introduction of the participant.

9. The participant will not be paid for absences for any reason, must contact Futures if any problems arise and “inform the placement supervisor immediately if involved in an accident or injury during the placement”. The participant must arrange his or her own OHIP. (All the respondent’s employees must arrange their own OHIP.)

10. Futures will monitor the participant and is responsible for workers’ compensation claims. Of particular interest is term 4:

- (4) The delivery organization will provide the participant with an hourly minimum wage of \$4.00 during the placement, plus 4% vacation allowance. Deductions will be made for the following: Canada Pension, Unemployment Insurance and Income Tax.

With respect to its other employees who are subsidized and whose status is not disputed, the respondent establishes the wages which are then subsidized by the external agencies.

11. The contract states that “Participants are employees of the delivery organization for the duration of this agreement and may be assigned to, or removed from a work placement at the discretion of the Futures Manager”.

12. Counsel for the respondent indicated that the practice might be somewhat different than the contract itself indicates. He stated that the respondent determines the working conditions and the work to be done, although if work not agreed upon is to be given, the respondent must inform the College, since work had to be approved in advance by the College. The respondent has given these individuals a variety of work, however, and does not appear to have been restricted by their status as “participants”. It may be that the nature of the work they can do is limited by the type of training they are receiving, but within that limit, the respondent appears to be able to assign a range of duties similar to that it would assign to a regular employee in the same kind of job position. The respondent determines which of the persons available to it it wishes to hire. However, counsel for the respondent argued that it was a “red herring” to look only at the actual employment relationship and to ignore what “went on before” with respect to the contract. He emphasised that the wages and hours of work are determined by Futures and are not negotiable

and that to some extent the nature of the work which the participants can perform is also limited by the contract. He pointed out that the contract is for a specific period of time and that the only connection between the respondent and the participants is for that short period. He argued that the respondent is entitled to direct the participants, just as it would be entitled to direct anyone on its premises, and that such direction does not indicate an employment relationship. He submitted that the test must be a tangible, real connection; here there was only a tenuous connection because of the short period of the contract. The important point, he submitted, was that there is no connection between the respondent and the participants with respect to funding.

13. Both persons appearing for the objectors are themselves participants under the Futures Program. The chief spokesperson for the objectors stated that the participants do the same job as anyone else and that she considers herself an employee of the respondent. She said that the College evaluates the job, but that the supervisor on the job can discipline participants, although she gave no examples of when that had occurred. She further stated that she had no contact with the College other than her paycheque; she said that if she had a problem with her paycheque, she would approach the Futures office. But her view was that the respondent “control[s] me”.

14. The applicant’s representative stressed that the employees’ own perception was that the respondent was their employer. However, he referred only to the objectors’ chief representative as the source of his position and made no mention of other employees. He argued that the respondent gives the participants instruction, evaluates them and can fire them and that these responsibilities or powers establish an employment relationship for the purposes of the *Labour Relations Act*.

15. It is our view that despite the contractual restrictions and the fact that the participants are paid by Futures, all the disputed individuals under the Futures program are employees of the respondent. We also consider George Thibert to be an employee of the respondent despite his receipt of municipal assistance in lieu of “wages” directly from the respondent. In all six cases, the respondent benefits from the work performed by the disputed individuals and controls entirely or in large part these persons in their day-to-day duties.

16. The Board has considered the question of who is an employee for the purpose of certification on several occasions. In particular, the Board has been required to determine whether persons who are in fact paid by entities other than the employer are employees of the employer for purposes of collective bargaining. In other cases, the Board has had to determine which of two potential employers is the employer for the purposes of collective bargaining.

17. Counsel for the respondent referred us only to *York Condominium*, [1977] OLRB Rep. Oct. 645 and *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538. Both these cases involve determining which of two potential employers is the actual employer. In both cases, the Board used seven criteria derived from the Board’s earlier jurisprudence and first set out in *York Condominium*. Although this case does not involve more than one potential employer, the respondent’s counsel urged us to apply these criteria. While the facts in this case do not unequivocally lead to the conclusion that the respondent is the employer of the disputed individuals, we are of the view that they do permit us to conclude that the respondent satisfies at least five of the criteria. For the sake of comparison, we refer to Futures as the other potential employer. We apply the seven criteria as follows:

1. The party exercising direction and control over the employees performing the work.
To the extent that Futures does exercise some control, it appears to be mainly in restricting the nature of the work, while the respondent exercises day-to-day control, assigns work and evaluates the participants.

2. The party bearing the burden of remuneration.
Futures is entirely responsible for wages.
3. The party imposing discipline.
Futures can remove an individual from the program, but the respondent can discipline on the job, including firing a participant.
4. The party hiring the employees.
Futures selects the participants for the program, but the respondent can hire as it wishes from the available pool.
5. The party with the authority to dismiss the employees.
Futures can remove an individual from the program, but the respondent, too, can fire participants.
6. The party which is perceived to be the employer by the employees.
The only evidence before us indicates that the respondent is perceived to be the employer.
7. The existence of an intention to create the relationship of employer and employees.
The contract entered into by all three parties refers to the respondent as the "employer". However, it also refers to the respondent as "the placement". Furthermore, it specifically states that the participants are employees of Futures.

We conclude that the respondent can be said to be the employer under criteria 1, 3, 4, 5 and 6. Only criteria 2 and 7 are clearly applicable to Futures, while criterion 6 is applicable only to the respondent. While criteria 1, 3, 4 and 5 apply to both the respondent and Futures, the evidence indicates that the respondent has more involvement with the participants on a day-to-day basis.

18. In addition to these factors, we also note two others. The work performed by the disputed individuals is performed on the respondent's property, not at the College or in the Future's office. Furthermore, the sole beneficiary of the labour produced by these individuals is the respondent.

19. In *Sutton Place, supra*, the panel's review of the Board's jurisprudence indicated that no single factor has consistently determined that a particular entity is the actual employer. The Board concluded at paragraph 43:

The weight to be accorded the various indicators of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may concluded [sic] that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

In our view, this statement of the interrelationship among the factors requires us to assess the relationship as a composite whole and not as comprised of discrete elements.

20. The respondent's counsel stressed that Futures sets wages and hours. The respondent is permitted to have no impact on either of these factors. However, the ambivalent status of the

source of remuneration as a determinative factor is revealed in *Templet Services* [1974] OLRB Rep. Sept. 606, *Ralston Purina* [1979] OLRB Rep. June 552, *Ontario Board of Internal Economy, Quorum Inc.*, [1984] OLRB Rep. Dec. 1760 and *Waterloo County Roman Catholic Separate School Board*, [1977] OLRB Rep. Dec. 856. A focus on the source of payment to the exclusion of other factors may obscure the true nature of the employment relationship. In more general terms, while a mechanical “check-off” of specified criteria aids predictability, it is also easier to avoid or evade than an assessment based on an appreciation of the essential nature of the employment relationship and the place of the disputed individuals in the respondent’s total enterprise. The importance of the role played by the individuals in the respondent’s enterprise was pointed out in *Guelph Beef Centre Inc.*, [1977] OLRB Rep. Mar. 184. There the Board was required to determine whether inmates of a provincial correctional institution who were involved in a rehabilitation program run at the respondent’s premises on the grounds of the institution and funded by the provincial government were employees of the respondent. The inmates worked as trainees, were paid by the respondent (although the payments were held in trust by the Ministry of Correctional Services) and could work overtime. The Board concluded at paragraph 13 that

13. ... most of the normal indicators of an employment relationship, hiring, control and direction of the work force, payment of wages, promotion and discipline are present in the relationship between the inmates and the respondent although perhaps to a somewhat lesser degree than is normally the case in the industrial setting.

More generally, however, the Board found at paragraph 14 that

14. ... from the point of view of the respondent, which is the alleged employer, the services provided by the inmates are an integral and significant part of its meat-packing operation ... The services which the inmates provide are not only of substantial benefit to the respondent, they are services which would otherwise have to be obtained from another source.

In our view the relationship of the disputed individuals to the respondent’s work force as a whole and to the respondent’s work structure is a major consideration in determining whether the respondent is their employer. This is particularly true when the alleged employer is benefiting from subsidization of its work force.

21. The Board has had the opportunity to consider the status of subsidized “employees” in several cases. In our view, these cases are of particular relevance to the facts in the instant case. The nature of the issue was stated explicitly by the Board in *Waterloo County Roman Catholic Separate School Board*, *supra*. That case concerned the status of students employed by the respondent who were paid partially by the School Board and partially by government assistance programs. The Board considered whether the make-work schemes had the effect of excluding the students from the provisions of the *Labour Relations Act*. Although that is not precisely the issue in the instant case, the concern expressed by the Board at paragraph 7 in relation to that issue does apply:

7. In a time when many Canadians derive their wages through work support programs such as the Young Canada Work Program, Experience 77, L.I.P., D.R.E.E. and numbers of other schemes for the support of employment through the direct channelling of government funds, or through indirect forms of government subsidy to employers both public and private, that is a question of no small importance for the present and future scope of collective bargaining.

The Board held that the School Board was the employer of the students: “it interviews them, hires them and puts them to work for a period of time at a fixed wage computed hourly, weekly or monthly. The work performed is of benefit to the School Board and to that end it assigns, directs and supervises the tasks performed”. The Board held further that “the entitlement of the employees in question to the protection of The Labour Relations Act is not altered by the source of the funds which their employer uses to pay them”.

22. In *Regional Municipality of Hamilton-Wentworth*, [1982] OLRB Rep. Aug. 1179, the Board had to deal with whether persons on the municipal welfare rolls who were employed by the respondent were employees of the respondent. In that case, the program, which provided services to the elderly, was funded by the province and the municipality. Those persons chosen to participate in the program received a regular hourly wage plus a bus pass and drug card (Mr. Thibert is apparently not paid on an hourly basis, but continues to receive welfare). The Board found them to be employees. It stated at paragraph 18:

18. We do not attach much significance to the fact that an arrangement may be described as a 'make work' scheme funded in whole or in part by the public purse ... In today's society there is nothing particularly novel about employment in a publicly funded "make work" program of limited duration where the participants have no real prospects of advancement. One may question the value of collective bargaining for such persons but that does not mean that they are not employees.

23. Finally, the facts in this case bear a considerable similarity to the facts in *Elizabeth Fry Society of Ottawa*, [1985] OLRB rep. July 1026. There the Society hired persons for a limited time under a variety of government-funded programs, particularly the Ontario Youth Corps Programme. These persons were divided into Group A and Group B. Group A people had special difficulties in finding a job for various reasons such as low education or disabilities, for example. Group B people were qualified but nevertheless had difficulty finding work. The Board was concerned with the Group A people. Although there was no evidence that the persons in the instant case had the kind of special difficulties of the Group A people in *Elizabeth Fry*, the terms of the contract governing them are similar. Group A persons were fully funded by the government, as are the individuals in the instant case. They had to be between 15 and 24, have left school and been unemployed for at least twelve weeks. In the instant case, the participants must be between 18 and 24, have grade 12 education and been unemployed for twenty weeks. The Youth Corps program lasted twenty-six weeks; here it is sixteen weeks. In particular, we note that the Youth Corps contract prohibited supplementation of wages which were at the minimum wage level and were limited to forty hours work a week. There was no pay when the participant was absent. In the instant case, the participants are paid \$4.00 an hour which cannot be supplemented, they can work only forty hours a week and are not paid for absences. As in the instant case, the workers in *Elizabeth Fry* could not replace or encroach upon the work of regular employees. Furthermore, in both cases "[t]he terms and conditions of employment for the ... participants bear no relation whatsoever to the terms of the respondent's regular employees. They are prescribed and circumscribed by the provisions of the programme".

24. There are differences between *Elizabeth Fry* and the instant case, however. In *Elizabeth Fry* a letter to the respondent from an official of the Ministry of Correctional Services stated that "Youth Corps participants are considered employees of your organization and should be covered under your Workers' Compensation schedule". In the instant case, the contract declares the participants to be employees of Futures who is responsible under workers' compensation. The Board in *Elizabeth Fry* considered the employee designation "interesting", but not determinative. In addition, the Society paid the employees, making the usual deductions; the Society was then reimbursed by the Youth Corps Programme. In the instant case, the participants are paid directly by Futures. But the effect in both cases is the same: the respondent (Society or Telkom) does not bear the burden of remuneration.

25. We adopt the conclusion of the Board in the *Elizabeth Fry Society* case:

If one applies the usual criteria to the relationship between the respondent and the participants in the programme, there is little doubt that it points to an employer-employee relationship. The participants are not volunteers, students, or independent contractors. They work for wages.

They are referred to the respondent by others, but they are ... finally selected by the respondent, and paid at a fixed rate computed hourly from which the usual "employee" contributions (UIC, CPP, income tax, etc.) are deducted ... [T]heir tasks are not generically different from those performed by the respondent's regular employees ... [T]hey are providing services to the respondent, subject to the respondent's direction and supervision.

26. We therefore conclude that the five Futures participants and George Thibert are employees for the purposes of the *Labour Relations Act* and are to be included in the employer's list of employees for purposes of the application for certification. In our view, if the disputed individuals were not being paid by a source other than the respondent, their status as employees of the respondent would not be in doubt.

27. It should be noted that the Board in the *Elizabeth Fry Society* case held that the Youth Corps workers should be excluded from the bargaining units which the applicant in that case sought to represent. In the instant case, neither the applicant nor the respondent sought to exclude the disputed workers from the bargaining unit, should we find them to be employees. Indeed, the parties agreed on a bargaining unit description which would encompass the disputed individuals should we find them to be employees. Accordingly, the disputed individuals are included in the bargaining unit which the applicant seeks to represent, the description of which is set out in paragraph 3, *supra*. We might add that in our view, it is appropriate to include these individuals in the bargaining unit since they are an integral aspect of the respondent's work force. It is not for the Board to determine the extent to which these particular employees will be able to benefit from collective bargaining or the extent to which the union can attempt to improve their terms of employment through collective bargaining: *Guelph Beef Centre Inc.*, *supra*. However, we note that collective bargaining occurs with respect to both non-financial and financial aspects of the work environment.

28. The applicant challenges the inclusion of two persons on the employer's list under section 1(3)(b) of the *Labour Relations Act* on the basis that they are performing managerial functions. Accordingly, we order that a Labour Relations officer be appointed to inquire into and to report back to the Board on the duties and responsibilities of Robert Burditt and Dianne McLean.

29. The applicant filed 43 combination application for membership and receipt cards, 42 of which coincide with the names of employees included in the bargaining unit for purposes of the count. The objectors filed a petition expressing opposition to representation by the applicant bearing the names of 32 persons, 30 of whom also signed membership cards. It appears from the applicant's membership position and the extent of the overlap between employees who signed both union membership evidence and the statement of desire that it will be necessary for the Board to inquire into the voluntariness of the petition. The three revocations filed with the Board, two of which coincide with the list of employees, do not change that situation. In addition, the applicant has alleged violations of sections 64 and 70 of the *Labour Relations Act* which are relevant to the voluntariness of the petition.

30. This matter is accordingly referred back to the Registrar for rescheduling in order to permit the parties to address the voluntariness of the petition, including the allegations by the applicant under sections 64 and 70 of the *Labour Relations Act*.

31. This panel is not seized of this matter.

DECISION OF BOARD MEMBER F. W. MURRAY;

1. I dissent.

2. I would have found that the five persons that are under the Futures Program, and the sixth person who receives welfare assistance from the City of Windsor plus \$3.00 per day and transportation cost are not employees within the meaning of the Act. If it were to be found that these persons are in fact employees, it is my opinion that they are not employees of the respondent.
3. No evidence was adduced as to what would happen to them if the respondent terminated them. For all we know, in such an event, they might well be immediately dispatched to another company.
4. No evidence was also adduced so as to cause me to believe as a result of their work at the respondent's premises that the respondent necessarily benefited from such endeavours.
5. Accordingly, I would have excluded these persons from the bargaining unit.

2361-84-R Ontario Public Service Employees Union, Applicant, v. The Board of Education for the City of Toronto, Respondent, v. Ontario Secondary School Teachers' Federation, Intervener

Bargaining Unit - Certification - Whether unit of Teachers of English in respondent's continuing education programme appropriate - Board reviewing approach to bargaining unit determinations - Unit based on subject-matter taught leading to undue fragmentation - Concerns for "self-determination" and "ease of organization" outweighed - Proposed unit held not appropriate

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members A. Grant and R. Wilson.

APPEARANCES: Chris G. Paliare and Barbara Linds for the applicant; Steven L. Moate and A. G. Price for the respondent; Maurice A. Green and Mary Templin for the intervener.

DECISION OF THE BOARD; June 9, 1986

I

1. This is an application for certification in which the applicant has requested and the Board has directed the taking of a "pre-hearing" representation vote.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant union is seeking to represent a bargaining unit consisting of some 300 instructors employed by the respondent to teach *non-credit* English as a second language ("ESL") courses in the respondent's adult and continuing education programme. The union does not seek to represent individuals who teach *credit* ESL courses. In the union's submission, these teachers fall outside the scope of the *Labour Relations Act* and within the ambit of "Bill 100": *The School Boards and Teachers Collective Negotiations Act (1975)* (in this regard, see the decision of this Board in *Ottawa Board of Education*, [1985] OLRB Rep. July 1139). The present application is restricted to non-credit ESL instructors. The union contends that they constitute a unit of employees appropriate for collective bargaining.

4. The respondent disagrees. The respondent asserts that the proposed bargaining unit is far too narrow, and should encompass, at the very least, all 1,100 instructors teaching non-credit courses in its continuing education programme. The respondent does not accept the correctness of the Board's decision in *Ottawa Board of Education, supra*, but concedes that, at this stage, it is unnecessary to address that question.

5. The facts are not substantially in dispute.

II

6. The respondent's department of continuing adult education is, in many respects, a third system complementing and supplementing the courses available in its established primary and secondary schools. The continuing education programme offers a wide variety of courses either for general interest and personal improvement, or for "credit" towards a diploma or certificate identical to that earned by students in the regular school programme.

7. In the instant case, we are concerned only with non-credit courses taught by individuals who need not be certified teachers and need not have any approved (by the Ministry of Education) qualifications in their chosen subject areas. However, even within the realm of non-credit courses there is considerable variety. A superficial glance at the 1984-85 course selection indicates that students may take such courses as: accounting, ceramics, computer programming (at various levels), law (of various kinds), word processing, languages (from Czech to Urdu), mathematics, music, aircraft/automechanics, computer-controlled machining, drafting and blueprint reading, electricity/electronics, graphic arts, welding, scientific subjects such as bacteriology or invertebrate paleontology, French as a second language, heritage languages (many), and so on.

8. As we have already noted, the instructors in these courses need not be individuals certified to teach in the regular school system, and may not have formalized training or accreditation of a kind which might be recognized in that system. But, this does not mean that they lack specialized skills, training, or experience in the subject area in which they are hired to teach. For example, the Board was advised that some of the law courses are taught by members of the Bar, and persons teaching electronics, drafting, art, or music, would ordinarily have training in those areas even though they might not have the formal credentials to teach credit courses in the regular day school programme.

9. Continuing education courses may be offered during the day, during the evening, or on weekends, in both school and non-school settings. The respondent's objective is to respond to such diverse community needs as Saturday morning enrichment for gifted students, the maintenance of heritage languages, the promotion of bilingualism, or upgrading for a secondary school diploma. The precise mix and location of courses changes from year to year, although there is an effort to maintain a degree of continuity, and respond to particular community concerns such as adult literacy, heritage language preservation, ESL, or, more recently, French as a second language. In 1984-85, ESL courses, of various kinds, were taught at 82 locations in Toronto. By way of comparison, heritage language courses involving 57 different languages were also taught at a number of locations after school, in the evening, and on weekends.

10. In the respondent's overall administrative structure, continuing education is treated as a "department", under the administrative authority of the assistant superintendent of curriculum and programmes. In this respect, it resembles other departments focusing on business education, computer studies and applications, early childhood education, guidance and counselling, or technical education. But the place of continuing education in the organization chart is a little misleading, because the courses offered through continuing education (credit and non-credit) often parallel those offered in the regular school programme or involve non-credit options in the same general

subject areas (as well as many others). Accordingly, for the purposes of curriculum content and development, the continuing education department draws upon the resources of the established "subject-based departments" which are responsible for curriculum planning and development in the regular school system. These include: arts, heritage languages, mathematics, modern language, music, science, social studies (including labour studies and women studies). That is why the continuing education department is properly regarded as an adjunct to the regular school system.

11. In the case of ESL, the curriculum is developed by the "language study centre" which, loosely speaking, is an "English department". In this respect, the continuing education department again draws upon the same resources as the regular day school. At one time ESL was a separate department administered in conjunction with heritage languages, but now it is not a separate administrative division, but rather a component (albeit an important one) of the continuing education programme which, together with adult literacy, is under the administrative authority of Mr. B. Dantini. ESL has a separate "line item" in the budget for non-salaried costs (like other subject areas) and, it seems, ESL instructors are issued separate cheques. However, it also appears that other distinct course-based groupings (example, instructors in the literacy programme) may also be paid by a separate cheque. Thus, if an individual teaches an ESL course and something else, he may receive more than one cheque. The evidence is that there are employees who teach both ESL and other continuing education courses.

12. The immediate supervisory structure for continuing education courses depends upon the place where the courses are taught. If a continuing education course is taught in a school, the local principal or vice-principal has overall administrative responsibility for the courses conducted in his building. If the local principal or vice-principal does not have the specific expertise in a subject area to monitor or assess the quality of particular courses, he can draw upon the experience of his own teachers or department heads, or delegate authority to them. Within any particular school, the principal is responsible for such administrative tasks or "paperwork" as may be required. This could include monitoring the use of equipment or materials, visiting classrooms, preparing attendance registers, providing payroll information to the respondent's payroll department, and regulating the utilization of classrooms.

13. In a non-school location (a library, community centre, etc.), there is a "lead teacher" or "supervisor" who oversees and co-ordinates the activities of the course instructors, and performs these administrative tasks. In the case of the ESL instructors, the lead teachers may not have any specific ESL training themselves, nor are they specifically restricted to supervising ESL instructors. However, because there is such a large group of ESL teachers, the lead teachers for ESL typically supervise only ESL teachers. But there can be lead teachers who are responsible for the supervision of other instructors and there are certainly ESL lead teachers who themselves teach courses in continuing education other than in the ESL area. Because of the number of ESL courses, instructors, and supervisors, the respondent has recently introduced an intermediate level of supervision described as "administrative leads" who also perform a co-ordinating/administrative role. In this respect, ESL is not unique. There are "administrative leads" in other large or expanding programmes, such as heritage languages or French as a second language.

14. Hiring is done in a school setting with the participation of the local principal and any supervisor who may be involved in that building. In a non-school setting, hiring is done by an administrative official from the continuing education department with the assistance of a lead teacher, and sometimes someone from the client community. The selection is made from the applications on file. The employment application is now standard for all non-credit courses. There is no specialized form for ESL or any other subject area, although this may once have been the case. Employment opportunities are fluid and somewhat unpredictable. As might be expected, these

essentially part-time work opportunities attract individuals who must accommodate their other employment or family commitments. Continuing education instructors (including those teaching ESL) work during the day, in the evenings, or on weekends in accordance with their own inclinations and the availability of job opportunities.

15. The employment of continuing education instructors (in ESL or otherwise) depends upon whether there is a sufficient number of students to make their scheduled courses viable. The instructors' employment may be terminated on 24 hours' written notice, either by a principal or an official of the continuing education department. There are only two standardized salary scales: one for certified teachers teaching credit courses (\$20.07 per instructional hour plus 7 per cent vacation pay and statutory holiday allowance) and one for instructors in all other programmes (\$19.13 per instructional hour plus 7 per cent vacation pay and statutory holiday allowance). The result is about a \$1.00 per hour wage differential. There are no other benefits for either group.

16. The salary scale is determined at the Metro level and, apparently, is accepted without question by the respondent. There is, therefore, no difference in the salary rate payable to instructors in the continuing education department, despite any arguable difference in the sophistication of the subject matter or their training, be it academic, technical or artistic. For example, at Jarvis Collegiate there are 29 ESL teachers, 14 of whom teach ESL *credit* courses and 15 of whom teach ESL *non-credit* courses. The latter group get a lower hourly rate, even though some of them have the qualifications to teach ESL credit courses should such opportunities arise. In summary, the terms and conditions of employment are identical for all non-credit continuing education instructors whether they teach ESL, some other language-related course (French as a second language, heritage languages) or any other course in the broad continuing education programme. The ESL instructors are different only to the extent that they are more numerous and teach a particular language-related subject - although even this is changing to some degree as more students express an interest in French as a second language or heritage languages.

17. The final factor which deserves consideration is the existing configuration of bargaining units within the respondent's organization. Some of these bargaining relationships were originally based upon OLRB certificates. Others were based upon voluntary recognition agreements. It is difficult to appreciate the complexity without an organization chart (exhibit 13). Indeed, the situation is already so fragmented that counsel for the applicant can plausibly (if somewhat rhetorically) assert: "What difference will it make if there is one more?"

18. Under Bill 100 the respondent engages in central and local negotiations for a collective agreement covering its elementary school teachers and principals who are represented by the Ontario Public School Teachers' Federation, the Federation of Women Teachers' Association, or L'Association des Enseignants Franco - Ontariens. For secondary school teachers there are local and central negotiations with the Ontario Secondary School Teachers' Federation. Under the *Labour Relations Act* CUPE Local 63 represents and bargains for a unit of some 230 chief caretakers and operating engineers in the respondent's plant operations department. CUPE Local 134 represents about 825 cleaners and maintenance helpers in a separate bargaining unit encompassing two departments. CUPE Local 134 also represents another unit of some 150 cafeteria employees in the respondent's food services department. CUPE Local 1316 represents a bargaining unit of 200 elementary clerical staff. CUPE Local 1325 represents a separate "administration clerical" bargaining unit consisting of secretarial and technical staff, including some drafting and computer personnel. OPSEU represents two bargaining units covering the respondent's elementary and secondary occasional teachers. The Toronto Educational Assistants Association bargains on behalf of assistant teachers working in the elementary and secondary schools. The Association of Toronto Secondary School Staff bargains on behalf of secondary school clerical staff not otherwise covered

by the other clerical bargaining units. An organization called the Drivers and Drivers' Helpers Association, as its name indicates, represents drivers working in the maintenance department. The Association of Professional Student Services Personnel represents a unit of social workers, psychologists and similar staff. For construction and maintenance tradesmen, the respondent has a relationship with the Toronto - Central Ontario Building and Construction Trades Council which, in turn, links it to collective agreements with the "main-line" construction workers' unions (insulators, boilermakers, bricklayers, carpenters, ironworkers, masons, painters, resilient floorworkers, sheet metal workers, and labourers). There are separate collective agreements for the electricians and plumbers working for the respondent on tasks which could not be considered "construction", "renovation", or "repair" (within the meaning of section 1(1)(f) of the *Labour Relations Act*) and are represented, respectively, by Local 353 of the International Brotherhood of Electrical Workers and Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada. Similarly, there are separate collective bargaining relationships and collective agreements with the International Association of Machinists and Aerospace Workers and the Upholsterers' International Union of North America, covering employees within their trade jurisdictions. Finally, it must be noted that there are large numbers of unorganized employees of various kinds in various locations (lifeguards, art models, dormitory supervisors, physical and occupational therapists, etc.) and including, of course, the instructors in the continuing education programme.

19. Without embarking upon an analysis of how one "counts" joint council relationships or the separate legal identity of local unions related to the same parent but representing separate bargaining units, it is apparent that the respondent already has a multitude of collective bargaining relationships and the prospect of many many more, depending upon how narrowly this Board is prepared to define the "appropriate bargaining unit" when one or another of these unrepresented employee groups develops an appetite for collective bargaining. It is a recognition of that prospect which prompted the respondent in the instant case to re-evaluate its earlier inclination to acquiesce in any bargaining unit which any union or employee association proposed. The resulting bargaining structure was already complex and could become unmanageable.

20. Before turning to the "appropriateness" of the proposed bargaining unit in the instant case, we will briefly review the Board's general approach in making bargaining unit determinations. That approach has been considered and elaborated in a number of recent cases to which we might usefully refer.

III

21. In the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the union proposed a bargaining unit consisting of hospital "service workers" (cleaning, housekeeping, laundry, maintenance employees, etc.). Service units of this kind are common in Ontario hospitals and typically exclude "technical" or paramedical employees who are either unorganized or grouped together in their own bargaining unit. The issue in *Hospital for Sick Children* was where to draw the line between these generic "service" and "technical" bargaining units; and, to this extent, the issue was different from the one we face. There was no problem of potential fragmentation because the disputed employee group would be assigned to one bargaining unit or the other, whereas in the instant case, the potential for further fragmentation of the bargaining structure is a principal concern of the respondent. Nevertheless, certain general comments about bargaining unit determination are equally apposite here:

12. Prior to the passage of collective bargaining legislation in the early 1940's, there was no prescribed mechanism for the acquisition of bargaining rights. If a group of employees sought to form or join a trade union, and if they had sufficient bargaining power, they were able to compel their employer to meet and bargain. However, the only means of achieving recognition was

to threaten a strike. A union had no statutory right to bargain on behalf of its members, and no statutory obligation to represent anyone else. Even if a bargain was struck, the agreement was not, in itself, a binding and enforceable contract. Its enforceability depended upon the parties' economic strength.

13. In 1943, borrowing from American experience, the Legislature passed the *Ontario Collective Bargaining Act* (S.O. 1943, c.4). The new legislation provided a process whereby a trade union could become the exclusive bargaining agent for the employees in a "unit of employees...appropriate for the purposes of collective bargaining" which could be an "employer unit, craft unit, plant unit, or a subdivision thereof" (see section 13(5a)). Over the years, that language has not changed very much. Section 1 and 6 of the present *Labour Relations Act* read (in part) as follows:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

1.-(1) In this Act,

• • •

- (b) "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

15. Now obviously, the determination of the appropriate bargaining unit has immense practical and tactical significance. The unit determines the constituency within which the union must establish majority support if there is to be any collective bargaining at all. To put it another way, the unit determines the group of employees whose support must be solicited by their fellows if

the objective of collective bargaining is to be achieved. A union cannot seek certification solely for those who have opted to join it. It is required by law to establish majority support in what *this Board* determines is an appropriate unit, and that may not be so easy to predict - as the present case indicates. Moreover, to the extent that the contours of the bargaining unit are unclear, there will be uncertainty about precisely how employees should go about organizing themselves in order to conform with what the law may require. There will also be the prospect of litigation, cost, and delay which may prejudice both the applicant union and the employees it seeks to represent (see the remarks of Laskin, J.A. in *Nick Masney Hotels Limited*, (1970) 13 D.L.R. (3d) 289; 70 CLLC 14,010; and those of Estey J.A. (as he then was) in *Re Journal Publishing Co. of Ottawa et al.*, and *Ottawa Newspaper Guild et al.* [1977] 1 ACWS 817). Cost and delay will also be of concern to the employer, and to employees whose wages may be temporarily "frozen" by section 79 of the Act even if they are ultimately excluded from the bargaining unit. The situation is exacerbated in the instant case where the bargaining unit is large, and both parties have experienced some difficulty determining the precise perimeter of the unit, and how (if at all) it can be meaningfully and consistently distinguished from the lower levels of employees working nominally (in the employer's terms) in "technical" job classifications.

...

17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

Similar views were expressed ten years before in *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7:

10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination

as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, 1969 June OLRB Monthly Report 340.

11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but “the unit of employees that is appropriate for collective bargaining.” In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February OLRB Monthly Report 103, and in the *Board of Education for the City of Toronto* case, *supra*.

12. The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: “‘bargaining unit’ means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.” This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*.

22. The concern about fragmentation was addressed squarely in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459. There, two unions were attempting to organize differently described but overlapping proposed units of paramedical employees, and the initial problem was to determine the description of the appropriate unit. The Board recognized that in the particular environment of a public hospital, pharmacists, physiotherapists, social workers, orthotists, speech pathologists, etc. all had an arguably distinct identity stemming from such factors as their specialized training, outside professional associations, or participation in a particular hospital department. Moreover, hospital departments typically had a specialized focus, with the result that, while there might be a hierarchy of specialization and potential for advancement within each department, there was less likely to be a transfer, promotion or progression up the job ladder from one department to another (see also for *Hospital for Sick Children* at paragraphs 26-28). Thus, each subgroup and each department could claim a distinct community of interest; however, the Board made it clear that this did not mean that each of these groupings would constitute a separate bargaining unit for collective bargaining purposes. Such balkanization of bargaining would create serious administrative problems for the hospital which could potentially be faced with a large number of bargaining units and trade unions. Nor, for reasons set out at length, was the Board persuaded that technical, paramedical, paraprofessional, or professional employees should be distinguished for collective bargaining purposes, even though there were obviously important distinctions between the various subgroupings based upon their level of education, responsibilities, degree of independence, and how far they had travelled along what the Board described as the “road to professional-

zation". The Board was of the view that for collective bargaining purposes they could all comfortably co-exist within one broadly-defined paramedical bargaining unit.

23. In *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, the Board also canvassed the potential collective bargaining consequences of a bargaining unit too narrowly defined. In that case the applicant was seeking to represent a "craft" unit of 100 certified electricians who were part of a maintenance department of 800 employees and an industrial work force of 2800, all of whom were unorganized. The union's bargaining unit proposition was based upon its proposed interpretation of section 6(3) [the craft unit provision] of the Act, but the Board also made some observations about the potential significance of a bargaining unit determination made under section 6(1):

50. We may begin by observing that the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patchwork quilt of bargaining units is a recipe for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

Again, the Board was saying nothing new. Precisely a year before in *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, a panel of the Board observed:

13. The concept of a bargaining unit performs two quite distinct functions in labour relations law. In order to be certified, a trade union must enjoy the support of a majority of employees in a bargaining unit. The unit serves as an electoral district in this setting. After a union is certi-

fied, the bargaining unit found by the Board to be appropriate strongly influences the conduct of collective bargaining. Although the parties sometimes vary this unit description, it is frequently simply reproduced in the recognition clause in a collective agreement.

14. A trade union may experience unsurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRB 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differen-

tials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited*, *supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been "hard pressed" not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

24. Finally, for the purpose of completeness, we should reiterate the Board's traditional and continued reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W.R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Rosco Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry, where departmental unionization has existed in the extreme, the Board indicated in 1981 that it might reverse the entrenched organizing patterns of the past, in favour of broader-based bargaining (see *Hamilton Spectator*, [1981] OLRB Rep. Aug. 1177). Most recently, in *T. Eaton Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board repeated once again that it would not be conducive to orderly and stable collective bargaining to divide up an employer's business into bargaining units based on departments. In the former case, for example, the Board refused to exclude a specialized department from a broader "sales" bargaining unit even though the employees' skills, method of payment and likely career opportunities were somewhat different from those of many of the other salesmen:

6. In the present case, some differences do exist between the sales staff of the Business Centre and those of other departments. But these are differences essentially in degree, and the most distinctive of the Business Centre's working conditions are not without parallels, as discussed above, in some or other of the sales departments already encompassed within the agreed-upon units for this store. Nor does an apparent lack of interest in lateral transfers form a compelling basis for compartmentalized bargaining: the same could be said for many of the technically-

skilled and higher-paid departments within an industrial production facility, yet the Board has not viewed as appropriate a proliferation of self-contained skilled-trade or similarly specialized units within a plant. While the question before us in the present application is whether to accede to the request of the employer to allow this one small group to remain outside the broader-based sales unit, viewing the matter from the point of view of its corollary better illustrates the problem. If the 5-man sales unit of the Business Centre is appropriate for exclusion from the broader sales unit now before us, it presumably would also be found appropriate as a self-contained bargaining unit at another store, where *no* other union organizing may yet have taken place. That is not the kind of piecemeal organizing or collective bargaining which the Board would be anxious to foster in this industry. While the needs of the Centre may require certain accommodations, we are not persuaded on the facts that those accommodations cannot be made within the broader context of the varyingly specialized and commissioned/non-commissioned sales unit.

We do not think it would serve any useful purpose to further clutter these reasons with extensive quotes from other Board decisions. We have included these references only to underline the considerations and concerns which have influenced the Board for many years, in many industrial contexts - considerations and concerns which we must largely abandon if we are to accept the bargaining unit proposed by the union in the instant case.

IV

25. There is no doubt that ESL instructors teach courses that are somewhat different from those taught by other instructors (although not so obviously different from other language instructors). But that is not a sufficient basis for concluding that they should be regarded as a separate unit for collective bargaining purposes. They are not certified teachers and do not require any specialized accreditation in order to teach their courses; nor is it apparent that they have any distinct or unusual teaching skills which are manifestly different from those of other continuing education instructors. The nature of their work - teaching - is very much the same, and they share the same working conditions and terms and conditions of employment. All continuing education instructors in non-credit courses receive the same salary and benefits and work in a variety of locations during the day, evening, or on weekends.

26. There is no significant difference in the structure of supervision. In a school setting, a principal or vice-principal has overall responsibility and in a non-school setting it is a lead teacher who, interestingly enough, need not have any particular training in ESL. ESL is an integrated and important part of the respondent's overall continuing education programme which is linked to the curriculum planning resources of the language study centre in the same way as other courses are, and in the same way as other courses may draw upon the resources of the mathematics, modern languages, or other departments. ESL is not a separate department or administrative subdivision within the respondent's organization, and even if it was, that would not in itself justify a separate unit for collective bargaining purposes any more than a departmental bargaining unit would be appropriate in a factory, hospital or municipal corporation. If ESL teachers form an appropriate bargaining unit, so would the teachers of heritage languages, French as a second language, accounting, or automechanics. In each case the instructors teach a distinct course with a definable and different subject matter requiring some specialized knowledge or training. If the union is right in its analysis, the spectre of a multiplicity (perhaps dozens) of new bargaining units is an entirely plausible one and would only exacerbate the present situation in which there are already a very large number of bargaining units.

27. Is there any enlightenment to be gleaned from the structure of collective bargaining under Bill 100 or by recent legislative trends? We think there is.

28. Under Bill 100 bargaining units are not defined by school, let alone by subject area, nor was this the historical pattern of bargaining prior to Bill 100. Certain features of Bill 100 are quite

unique, but, for our purposes, it is interesting to note that the bargaining units are based upon broad groupings of employees of a particular board of education - not employees of a particular school or teaching particular subjects. Indeed, in Metropolitan Toronto even this has been modified for bargaining purposes with the 1983 amendments to the *Municipality of Metropolitan Toronto Act* which require the various local boards and teacher organizations to engage in Metro-wide bargaining to conclude a single Metro agreement. Without getting into the details, it is obvious that the legislative intent is that there be broader-based bargaining in that portion of the education sector to which Bill 100 applies. Similar concerns in the Ontario construction industry prompted the Legislature, in 1978, to impose a system of province-wide bargaining by trade in place of the fragmented system of bargaining which was in place before. Likewise, at the Federal level and in the Province of British Columbia, the Legislatures and labour relations boards have been moving towards broader-based bargaining structures as a means of ensuring more stable collective bargaining relationships. The Canada Labour Code no longer recognizes a right to "craft" bargaining units, and that right in Ontario is carefully circumscribed (see section 6(3) of the Act). None of these trends are binding upon this Board, of course, but they do indicate that the concerns expressed by the Board in the cases mentioned above (as well as others) are widely shared. Moreover, where the Board may lack the power to later consolidate and rationalize the bargaining structure (as the Federal and B. C. labour boards can do), it should be particularly careful in fashioning the bargaining unit in the first place.

29. If general policy or community of interest considerations do not support the applicant's proposed bargaining unit, what of the organizational concerns mentioned in *Ryerson Polytechnical Institute, supra*, and *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250? We are not persuaded that a bargaining unit which, *at the very least*, encompasses all instructors in the continuing education programme creates significant organizational barriers. We note first that the applicant was able to organize a very significant number of instructors despite their geographic dispersion throughout Metropolitan Toronto where they work in a number of schools, libraries or community centres. It is not obvious that broader organizational efforts would be unsuccessful or that to facilitate employee access to collective bargaining it is necessary to define the bargaining unit in terms of the subject matter which instructors teach. Nor is this employer or industrial sector one in which there have been conspicuous difficulties in organizing. Quite the contrary. Primary and secondary school teachers have been organized for decades despite their exclusion from the remedial provisions of the *Labour Relations Act* and the absence of any other collective bargaining legislation available to them. Occasional ("supply") teachers working in the respondent's schools were organized by the applicant union in 1983 - despite the casual nature of their employment and the variety of locations in which they might be called upon to work from time to time. Other large groupings of the respondent's employees have organized, with the respondent's acquiescence, whenever they developed an appetite for trade union representation or collective bargaining. Indeed, it is the respondent's acceptance of its employees' right to organize and acquiescence in whatever bargaining unit their union proposed which eventually led to the current checkerboard pattern of bargaining units and the respondent's reappraisal of the desirability of extending this pattern. This is not a situation like that addressed by the Board in *K-Mart* where employer resistance and the inherent difficulties of organizing a number of separate locations meant that if only the broader-based bargaining unit was found to be appropriate there would be no collective bargaining at all. Thus, while we agree with the applicant that self-determination and ease of organization are factors to be considered in determining what bargaining unit is appropriate, they are not factors which should be given much weight in the instant case.

30. For all of these reasons, we are satisfied that the unit proposed by the applicant, namely, one confined to instructors teaching non-credit ESL courses in the respondent's continuing education programme is *not* appropriate for collective bargaining. Without, at this stage, determining

precisely what the appropriate bargaining unit should be (a decision which may turn, in part, on the determination of the Divisional Court reviewing the Board's decision in the *Ottawa Board of Education* case), we find that it must encompass at least all "non-credit" continuing education instructors. That being so, we find pursuant to section 8(4) of the Act that the applicant did not, in fact, have sufficient membership support to warrant the taking of a representation vote in the unit of employees appropriate for collective bargaining, whatever may have been its *appearance* of support in the voting constituency described in its initial application. Accordingly, it is unnecessary to count the ballots cast in that vote and the ballots will be destroyed within sixty days of the date hereof, unless, before that time, the applicant indicates in writing why the Board should not do so.

3119-85-R, 3120-85-U International Union of Operating Engineers, Local 796, Applicant/Complainant, v. Toronto College Street Centre Limited, Respondent

Sale of a Business - Unfair Labour Practice - "Taking back" by respondent project owner of management operations previously contracted out - Respondent hiring back administration staff and other former employees of subcontractor - Whether sale of part of subcontractor's business - Whether anti-union animus relevant to a determination under s. 63 - Unfair labour practice complaint dismissed - Union not having shown anti-union motive behind respondent company's move

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *R. J. Gallivan* and *B. L. Armstrong*.

APPEARANCES: *Maurice A. Greene*, *Michael Cameron* and *Paul Rapsey* for the applicant/complainant; *Donald F. O. Hersey* and *Ian Galloway* for the respondent.

DECISION OF THE BOARD; June 16, 1986

1. The Board hereby directs that the above complaints be and the same are hereby consolidated.
2. These matters concern an alleged violation of sections 64 and 66(a) and (b) of the *Labour Relations Act*, as well as an application pursuant to section 63 of the Act (i.e., wherein the union asserts that the respondent is bound by the collective agreement in effect between the union and A. E. LePage Real Estate Services Limited (LePage) by virtue of a "sale" from LePage to the respondent).
3. The Board heard testimony from two witnesses: M. Cameron, union business manager; I. Galloway, executive vice-president and chief financial officer of the respondent. Having weighed and assessed the evidence, including the credibility of the witnesses, and having regard to what is reasonably probable in the circumstances, the Board makes the following findings of fact.
4. The union was certified in March 1984 for what may be described as the maintenance employees of LePage at College Park. A collective agreement was entered into between the parties, with a term of October 29, 1984 to December 31, 1986. The respondent became aware, through normal management reporting, of both these events.
5. LePage managed College Park (also referred to as "the project") for the respondent pursuant to a contract first entered into in March 1979 for an initial three year term which was con-

tinued thereafter. In return for its services, LePage received a management fee at an initial rate of \$201,200 but reduced in early 1983 to \$150,000. The respondent also agreed, in section 5.04 of the contract, to assume the personnel costs associated with the project, although the persons would be hired in LePage's name and LePage was responsible for payroll records, deductions, etc. The contract between LePage and the respondent could be terminated by giving three months' notice in writing.

6. LePage and the respondent also had a leasing agreement since 1976 whereby commissions were payable to LePage for arranging leases in the project. The division of LePage handling this aspect was entirely separate from that dealing with the project management. Commission levels were frequently adjusted upwards and downwards to reflect the respondent's degree of eagerness to attract new tenants. It should also be noted that the respondent has continued a contract with another firm in respect of the project cleaning.

7. In the summer of 1985, the respondent concluded that the \$150,000 management fee could be saved by managing the project itself. This was now feasible given the availability of a pre-packaged computerized management system from a firm called Minicom Company. This proposal was approved at a meeting of the respondent's board of directors in the Summer 1985 and the decision communicated to LePage shortly thereafter. In fact, LePage was about to convert the project management to the same computerized system purchased by the respondent and, consequently, the respondent considered it appropriate to inform LePage that the contract would be cancelled before the latter embarked on the conversion. The parties agreed on a formal contract termination date of February 28, 1986, to provide sufficient lead time for the respondent to put the new system in place.

8. In the Fall 1985, the respondent sought legal advice with respect to its possible obligations vis-a-vis the union collective agreement with LePage and was informed that the collective agreement would not be binding, that the respondent was free to deal with the employees individually. The respondent first ascertained from LePage that the latter would not absorb these persons elsewhere in its organization and the employees would be terminated. The respondent then determined that it wished to hire those employees as the individuals had knowledge of, and experience with, the project. Some research was conducted on wage and benefit packages at other downtown Toronto building projects. The respondent decided to offer LePage employees a wage increase of 50¢ per hour to induce them to remain at the project. The benefit package is more difficult to compare but is somewhat better overall.

9. On February 14, 1986, the respondent met with the salaried employees (i.e., the project administrative staff) at 2:00 p.m. and then at 4:00 p.m. with the maintenance people. At the 4:00 p.m. meeting with the LePage bargaining unit employees, G. Bacque (president) and Galloway represented the respondent; R. Hasler (general manager) represented LePage. Bacque outlined the nature of the project, the respondent's structure, plans for further development and explained the termination of the management contract with LePage. The employees received a package of material containing a termination letter from LePage, an offer of employment letter from the respondent, applications for employment and benefits and a sheet outlining the benefit plan. The benefit plan was explained and the 50¢ per hour increase noted. Bacque stated that, in order for the respondent to meet the payroll and benefits deadlines of March 1, 1986, the employees would have to indicate, by the following Wednesday, whether the offers of employment were accepted. In response to an employee's question as to whether the respondent was unionized, Bacque replied no. Following this answer, there was some discussion amongst employees as to whether the respondent was bound by the LePage collective agreement. Other questions regarding the respondent's

payroll system (cheque or direct deposit and the frequency thereof), holidays and vacation entitlements for 1986 were answered.

10. All the bargaining unit employees did accept the offers of employment. Further, the entire project administrative staff for LePage, with one exception who refused an offer of employment, was hired by the respondent, although there are also a few of the respondent's own administrative staff involved in the project management. That is, the designated staff in the 1979 contract, i.e., the building manager, retail manager, two administrative assistants and receptionist/secretary, plus additional administrative staff hired over the years became the respondent's management staff for the project. This included Hasler, the general manager who had attended the February 14th meeting on behalf of LePage.

11. Cameron testified that, prior to the February meeting, the bargaining union members had expressed the usual sorts of job security concerns given layoffs in the industry at a union meeting two or three weeks previously. Since then, however, the employees have evinced no interest in attending union meetings. One employee apparently indicated that, as there was a new company involved which had just granted a wage increase, the employees wanted to "wait and see how things went".

12. Counsel for the union submitted that the thrust of section 63 was to protect bargaining rights and, thus, a broad meaning should be given to the words "sale" and "part of a business" in that section. Further, counsel argued that the principles applicable to "contracting out" should likewise govern the reverse situation, as here, where a company "takes back" part of a business. Counsel reviewed the evidence and, with respect to the section 63 aspect, referred to in support: *City of Peterborough*, [1979] OLRB Rep. Feb. 133; *More Groceteria Limited*, [1980] OLRB Rep. Apr. 486; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923. With respect to the section 89 complaint, counsel asserted the respondent developed a long term plan to more tightly control costs, including the personnel costs associated with the management of the project. Accordingly, it was argued, the respondent terminated the LePage contract and "bought off" the employees with an immediate wage increase in the knowledge that, as happened in fact, there would be a "chilling" effect on the union's support amongst those employees. *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577 was cited. Counsel also asserted, in reply, that anti-union animus was irrelevant to the operation of section 63, given the definition of "sale" in the Act and the purpose of that section. Counsel also dealt with his interpretation of section 12.03 of the contract with LePage. In the Board's view, this issue is not necessary to the Board's disposition of the complaint/application and the matter is not dealt with further.

13. Counsel for the respondent submitted there was no evidence whatsoever of anti-union animus. That is, it was argued the respondent terminated the management contract with LePage to save the fee involved and because of the availability of the computer package. Further, Galloway's testimony regarding the wage increase and benefit package in order to provide competitive rates to induce employees to remain at the project was candid and clear, in counsel's view. With respect to section 63, counsel agreed that the jurisprudence regarding "contracting out" was applicable to the reverse process but asserted the contracting out cases generally involved the finding of anti-union animus. Otherwise, contracting "in" and "out" were permissible. Cases cited included: *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931.

14. The Board first deals briefly with the section 89 complaint. The Board affirms the jurisprudence, as set out in *Westinghouse Canada*, *supra*, that the appropriate test in such cases is not whether there existed a legitimate business reason for the action taken by the respondent but

whether an anti-union motive formed any part of the grounds for the decision. The assessment as to whether the decision was “tainted” by anti-union animus is, of course, a factual matter dependent upon the circumstances of each case. There were no doubt sound business reasons for the respondent’s decision to terminate the contract with LePage. Not only would that generate a significant saving of the management fee, (\$150,000 annually) but, as well, there was now available a computerized management system which could “replace” LePage’s expertise in the area. Indeed, as noted, LePage itself was converting its operations to this software system. Beyond that, however, the Board is satisfied that there was no anti-union motive in the decision. The question of the “union” was not raised at the meeting of the respondent’s board of directors in the Summer of 1985 where the decision was taken. Moreover, the respondent subsequently sought legal advice as to whether the respondent had any obligations with respect to the collective agreement with LePage. On being advised there was no such obligation and, following notification by LePage that it would terminate those employees, the respondent decided to offer employment to the workers. To retain an experienced workforce, the respondent decided to offer an enhanced wage and benefit package. In reaching this conclusion, the Board accepts the testimony of Galloway. In the Board’s view, Galloway was a candid and straightforward witness, particularly during cross-examination. In Galloway’s frank responses, there was not a suggestion of anti-union animus and the Board is not prepared to conclude that the enhanced wage and benefit package, of itself, warrants a finding that the respondent committed an unfair labour practice. Rather, the respondent acted in good faith on the legal advice received. For the reasons set out below, however, that advice simply proved incorrect. Accordingly, the Board dismisses the union’s section 89 complaint.

15. The Board next turns to the section 63 aspect; that section reads, in part:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

16. The Board first notes that, while most cases have arisen in the context of “contracting out”, the principles developed to assess whether that contracting out constitutes a commercial transaction within the meaning of section 63 of the Act are equally applicable to the reverse situation, where there is a “contracting in” or “taking back” of an operation by a company: *City of Peterborough, supra*.

17. Moreover, while many of the “sale” cases have also involved a finding of anti-union animus (*Kennedy Lodge, supra*; *Westinghouse, supra*), section 63 is not conditional upon such a finding, i.e., section 63 is simply not a “motive” section. The Board sees no need to refer to the jurisprudence in this regard, except *More Groceteria, supra*, at paras. 15 and 16, which clearly states the dual purpose of section 63 [then 55] of “guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context” and *Metropolitan Parking, supra*, at para. 26.

18. A useful summary of the relevant jurisprudence is contained in the following rather lengthy passage from *The Corporation of the City of Stratford, supra*:

25. Section 63 of the Act does not define the term "business" other than by stating that it "includes a part or parts thereof". Therefore, it is left to the Board to interpret the term "business", as used in section 63 of the Act, in a way which is sensitive to the purposes of the Act as a whole, and section 63 in particular, but having regard to the almost infinite variety of economic relationships to which the Act applies. The Board recognized that the activity of the entity which is subject to an application under section 63 will affect, to a substantial degree, the significance the Board will ascribe to the various parts of that entity that have been transferred when less than all of it is sold, in assessing whether there has been a sale of part of a business. The Board in *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536 wrote at 543:

"The term 'business' is at the heart of section 63, but it is this concept which is the most difficult to define. One usually thinks of a business as a profit-making economic activity, but in the *Labour Relations Act*, the term cannot be so restricted. The Act applies to municipalities, public libraries, universities, school boards, hospitals, and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of 'business' must be broad enough to include them. And in the case of undertakings in the service sector, such things as 'know how', managerial systems, and other intangibles may be much more important factors in the overall organization than a particular physical plant or configuration of assets."

26. The Board has previously indicated that the purpose of section 63 of the Act is to provide a much higher degree of stability to a collective bargaining relationship than would otherwise exist if collective agreements or bargaining rights were treated in law in the same way as are commercial contracts or rights created under commercial agreements. Collective agreements and bargaining rights are different. They are accorded significant protection by the *Labour Relations Act*. The Board, in *Marvel Jewelry Limited*, [1975] OLRB Rep. Sept. 733 capsulized the import of the Act in the following way at page 735:

"Section 55 [now 63] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business regardless of any change of ownership."

The Board further elaborated and explained the effect of section 63 in *The Charming Hostess Inc.*, *supra*, at page 542:

"When a business or part of a business is disposed of, the transferee acquires it subject to the collective bargaining obligations of his predecessor. Section 63 preserves the labour relations status quo by transforming collective bargaining rights into a form of 'vested interest', which attaches to the business entity, and like a charge on property 'runs with the business'. To accomplish this objective the statute gives a special meaning to the term 'sale', envisages the continuation of bargaining rights in a severable 'part' of an employer's operation, abrogates the notion of privity of contract, and virtually eliminates the significance of the separate legal identity of the new employer. Collective agreements are not treated like ordinary contracts, nor are a union's representation rights co-extensive with commercial ownership."

[emphasis added]

27. Where a vendor sells every element of its business directly to one purchaser who continues the vendor's business, the Board will find that such a transaction constitutes a sale of a business within the meaning of the Act. However, where one purchaser obtains less than all of the ele-

ments of the vendor's business, the Board may or may not find a sale of a part of a business, and the Board's determination will ultimately depend on what elements of the predecessor's business were sold to the purchaser. The Board commented on this in *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581 at 589:

"Almost anything actually traceable to the predecessor could be regarded as 'part' of its business, but it cannot have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this, would make section 55 [now 63] the vehicle for extending rather than preserving bargaining rights."

Assets are part of a business, as are the services the business provides. A sale of a part of a business within the meaning of the Act does not arise every time a discrete element of that business, such as a single piece of equipment, is sold. Section 63 of the Act is concerned with preserving bargaining rights when there is a disposition of a combination of elements that create employment. In *Beef Terminal*, [1980] OLRB Rep. Aug. 1167, the Board reviewed its earlier cases dealing with sales of a part of a business, and commented at 1177:

"In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, 'knowhow' or goodwill, - thereby allowing the successor to perform the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. In all of these cases there was a transfer of a distinct part of the predecessor's configuration of assets and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of the employee complement; and, but for section 55 the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied."

28. In the case before us, K. & E. is now performing, with its own employees, most of the garbage collection work that the City had previously performed. K. & E. was a pre-existing entity with its own management structure, capital assets, employees, entrepreneurial initiatives and business skills. We are satisfied that the City transferred to K. & E. the work that it no longer wished to perform. A similar issue arose in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 where the Board wrote at page 74:

"There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

The determination of whether a transaction constitutes a sale of a business, or whether it amounts to something less than a sale, is one that must be made on the facts. The question in each case is whether the evidence points to a continuation of the same business function as was carried on prior to the transaction. As the Board pointed out in *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467, for a transaction to be considered a sale of a business there must be the continuation of the same business, and not merely the performance of a like function by some other business. The Board, in making this distinction, must look beneath the form of the particular transaction to uncover its essential nature. As in the instant case, a

number of considerations must be taken into account before the Board can ascertain the true nature of the transaction."

See also *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293; *474619 Ontario Ltd.*, [1981] OLRB Rep. Oct. 1452; *Superior Sanitation Services Limited*, [1968] OLRB Rep. July 395.

29. The Board in *Metropolitan Parking Ltd.*, [1979] OLRB Rep. Dec. 1193 considered the various ways in which one employer could arrange its affairs so that another employer would perform the work that had been previously performed by the first employer when it wrote at page 1210-1211:

"The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A's employees within A's own organization are 'contracted out' to B, and B uses his own managerial skills, plant, equipment and 'know how' to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two business will remain in a kind of symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. If it is clear on the evidence, however, that B is unable to fulfil A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of 'part of a business') or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4).) If, however, 'but for' the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business - albeit a part which A no longer wishes to operate itself.

Similar considerations apply where A, for his own business reasons, chooses to change subcontractors and purchase his requirements elsewhere. Here also there would be a continuation of the work performed, and the new subcontractor may find itself in the same position of economic interdependence vis-a-vis A as a previous subcontractor. Again, these factors do not, in themselves, determine the applicability of section 55. Essentially the matter remains one of characterization. Is the transfer, if any, from the predecessor merely incidental, or is it integral, to the successor's ability to produce the goods or supply the services formerly produced by the predecessor? Has the successor acquired all, or a coherent and severable part, of the predecessor's economic organization? And to repeat the words of Widjery, J. in *Kenmir*, *supra* has the transaction put the successor in possession of a going concern, the activities of which he could then carry on without interruption? A transfer of work, by itself, is simply not enough to ground a section 55 finding."

19. As the above passage indicates, not every subcontracting arrangement will be found to fall within section 63 of the Act. The entering into and termination of subcontracts are commonplace commercial events. In the *City of Stratford*, *supra*, itself, for example, the Board concluded the arrangement between the City and K. & E. amounted to no more than the contract with K. & E. to perform garbage collection services utilizing the latter's considerable expertise, methods and equipment. In short, there was a transfer of work but not of a part of the City's business.

20. The facts of the instant case are quite different. Clearly the work performed remains the same, as does the location. And, the maintenance services performed by LePage constitute a "coherent and severable part" of LePage's business, as defined by the subcontract itself between LePage and the respondent. The Board was not informed about the transfer or otherwise of any equipment or other assets or what could be termed "assets" in the LePage operation. Beyond this, though, *all* of the former employees in the LePage bargaining unit were hired by the respondent at an enhanced wage and benefit package in order to retain those employees' experience and knowledge of the project. Further, the LePage administrative staff were all offered employment in the same positions but working for the respondent. All but one accepted. Thus, the management expertise, from the general manager on down, was acquired by the respondent to manage the project "in-house". Apart from the expertise personal to the employees (including administrative staff), though, the method of operation was identical, namely, the computerized management system, to that which LePage would have installed had the contract not been terminated. The respondent did not just "take back" the subcontract, it "took back" the employees, administrative staff and operational system. For the employees in the bargaining unit, nothing has changed, except the more attractive wage and benefit package and the name of their employer. In the Board's view, this is precisely the situation in which section 63 was intended to apply to preserve acquired bargaining rights notwithstanding a *bona fide* commercial transaction.

21. Accordingly, the Board finds that there has been a sale within the meaning of section 63 of the Act in that the respondent has acquired a part of LePage's business. Consequently, the respondent is bound by the collective agreement between the union and LePage, by virtue of section 63(2) of the Act. Given the Board's dismissal of the section 89 complaint, though, the Board is of the view that no further relief beyond the declaration is appropriate.

22. The Board shall remain seized in the event of any disagreement between the parties regarding the interpretation or implementation of this decision.

1718-85-U Canadian Paperworkers' Union, Complainant, v. W. H. Smith Canada Ltd., Respondent

Change in Working Conditions - Unfair Labour Practice - Downgrading of employee evaluation and failure to give usual wage adjustments - Board applying "reasonable expectation" test - Finding violation - Downgrading result of grievor's union activity

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members I. M. Stamp and P. J. O'Keeffe.

APPEARANCES: Douglas J. Wray and Gary Buccella for the applicant; Donald F. Hersey and William Hanchar for the respondent.

DECISION OF THE BOARD; June 9, 1986

1. This is a complaint pursuant to section 89 of the *Labour Relations Act* alleging violation of sections 64, 66, 70, 79 and 80 as a result of the performance evaluation given S. Fitzpatrick and the failure to give wage adjustments on the employment anniversary dates of Fitzpatrick, E. Rush-ton and A. Kuz. The complaint in respect of two other employees, H. Fellows and S. Leatham, was not pursued before the Board.

2. The Board heard testimony from five witnesses: W. Hanchar and L. Ugolini for the respondent; Fitzpatrick, Kuz and Rushton testified on their own behalf. In the Board's view, the complainant's witnesses were highly credible; their testimony was given in a straightforward manner with no attempt to exaggerate events where to do so might be regarded as to their "advantage", or vice versa. The same comment cannot be said of Hanchar, however, who was frequently evasive in response to questions on cross-examination. Further, several explanations proffered by Hanchar were just not believable, as noted in more detail *infra*. Having weighed and assessed the evidence, including the relative credibility of the witnesses and, what the Board regards as reasonably probable in the circumstances, the Board makes the following findings of fact.

3. Fitzpatrick was hired as a junior accounts payable clerk in the accounting department in August 1984. The hiring letter indicated there would be a review after three months and, thereafter, a wage and performance review at least annually. In fact, the "three month" review took place in February 1985 notwithstanding his promotion to intermediate accounts payable clerk as of November 1984. This review, by Fitzpatrick's supervisors (S. Wallace and C. Black), indicated a satisfactory performance.

4. Fitzpatrick and two other employees in the department, A. Carr and M. Alibi, were selected by the employees to discuss with Hanchar (vice-president as of January 1985 and formerly financial comptroller) general problems in the department, including wages, a benefit plan etc. Hanchar stated he was constrained by the budget but intended to ensure that productive employees would receive a sizeable wage increase while the "deadwood" would not receive any wage adjustment. Hanchar indicated he regarded the three employees as in the "productive" category. Hanchar also assured the three that he would look into a benefit plan, although he couldn't foresee any real difficulty in that regard.

5. When Hanchar did not respond within a month, as he had indicated he would, a second meeting was initiated by the employees in the department. This time, all attended. Hanchar briefly addressed the employees, stating that, according to a company survey, their wages were competitive for the retail industry. Further, a significant increase in benefits was unlikely as such improvements would have to be implemented for all employees and this would be too expensive. Working conditions and supervisors were also subjects touched on by Hanchar. In response to questions, Hanchar reiterated his view that Fitzpatrick was a good employee and, in fact, indicated the latter would be reviewed and receive a wage increase by the end of the month. In reply to another question, Hanchar affirmed that persons receiving promotions would still be entitled to their regular annual adjustment on their employment anniversary date.

6. On a subsequent occasion in June, Hanchar met with Fitzpatrick to discuss a specific account which had caused difficulty in the audit in previous years before Fitzpatrick assumed that responsibility. At that time, Hanchar stated he was pleased with Fitzpatrick's work, had heard positive comments about Fitzpatrick from others in the company, including P. Rainey (financial comptroller), S. Wallace (Fitzpatrick's supervisor at the time) and T. O'Hara (chief accountant).

7. The union organizing drive, which commenced in late June 1985, resulted in certification on July 29, 1985. Fitzpatrick was the main union organizer, attended the Board certification hearing in July, was elected local president in August and participated in all bargaining sessions from the notice to bargain in September 16, 1985 onward.

8. In August 1985, Fitzpatrick's immediate supervisor, M. Bradfield (who had replaced S. Wallace) initiated his performance review utilizing a standard performance appraisal form. Fitzpatrick rated himself as "good". Bradfield and M. Khan (department supervisor) met with Fitzpatrick to discuss the performance review in detail. Although Bradfield was a "new" supervisor with

the company, Khan had held a supervisory position for some time. Bradfield indicated Hanchar, as well as herself, were very pleased with Fitzpatrick's work; indeed, Hanchar told Bradfield he considered Fitzpatrick managerial material. Bradfield, however, gave Fitzpatrick a overall rating of "satisfactory" because the latter was spending too much time away from his desk. In her view, if this aspect was corrected, the rating would be "beyond good". It is appropriate to note that Kuz, whose desk was beside Fitzpatrick's in the office, estimated the latter spent no more than four or five percent of his time on "non-company" business, usually answering questions of employees who had approached him. Kuz also stated Fitzpatrick often worked lunch hours to meet his deadlines, as well. When Fitzpatrick asked about a wage adjustment, Bradfield indicated the company had instituted a wage freeze pending the union negotiations. Fitzpatrick responded that such a freeze was illegal and the union officials would be consulted. Bradfield tried to arrange an immediate meeting with Hanchar but Fitzpatrick was told Hanchar would get back to him as soon as possible.

9. About one week later, Fitzpatrick encountered Hanchar by chance. The latter stated he had reviewed Fitzpatrick's performance evaluation, was downgrading the overall rating to "unsatisfactory" and was not going to pay Fitzpatrick for organizing the union. When asked about the supposed wage freeze, Hanchar replied that wage adjustments were entirely within the company's prerogative and that policy was continuing. In fact, the company acknowledged it received legal advice that its initial position freezing wages was improper. Wage adjustments were implemented but according to the company's ostensible policy relating to the impact of promotions on the timing of reviews.

10. Kuz, hired as an administrative clerk in the mail room in August 1983 at \$4.20 per hour, received a satisfactory rating at his three month review from L. Ugolini (at that time, L. Loftus). In August 1984, Ugolini again rated Kuz as satisfactory and he received a 5 percent wage increase (to \$4.41 per hour). In September 1984, however, he was promoted to inventory clerk in the accounting department but did not receive a further raise. In April 1985, Kuz, again, was promoted to junior accounts payable clerk and to intermediate accounts payable clerk in June 1985. In both April and June, Kuz receive a wage increase with his promotion (to \$5.00 then \$5.50 an hour in respect of the April promotion; to \$6.00 per hour in June). As Kuz's employment anniversary date approached, he wrote Hanchar a memo seeking confirmation of his understanding of company policy to grant wage increases annually on that anniversary date, notwithstanding any intervening promotions, as Hanchar had indicated at the Spring 1985 meeting with employees. Hanchar never responded to the memo; however, Bradfield informed Kuz that the memo should have been addressed to her but implied that there would be such an increase. Like Fitzpatrick, Kuz was given a performance review. Kuz rated himself as "satisfactory" overall; Bradfield and Khan rated him as "good". In response to Kuz's question about a wage increase, Bradfield stated there would be no raise at that time; no further reasons were given. However, she did confirm that the company considered Kuz to be doing a good job and that he would be rewarded in the future. It should be noted, in passing, that Kuz was again promoted to senior accounts payable clerk in March 1986 with a raise to \$6.75 per hour.

11. Rushton was hired in September 1984 as a junior accounts payable clerk. His hiring letter, too, referred to a review after three months, an annual wage increase on the employment anniversary date and, in exceptional cases, a wage increase within the first year. The hiring letter, as in other instances, did not refer to promotions and their impact on salary increases. After three months, Rushton received a "fair" review which was upgraded to "satisfactory" two months later. In April 1985, he was promoted to intermediate accounts payable clerk and received a wage increment at that time (from \$5.50 to \$6.00 per hour). In approximately September 1985, Rushton too, was given a further performance review. In discussions, Bradfield and Khan were very positive

but, with respect to a wage increase, said their hands were tied and she would have to speak to Hanchar.

12. Counsel for the respondent reviewed the evidence with respect to the company policy on annual wage adjustments and performance reviews. Counsel submitted that, although the complainants and perhaps Bradfield, a new supervisor, were confused about the timing of these reviews, the company policy was to conduct an annual review on the anniversary date at the employee's hiring or last promotion, whichever was the later date. That is, it was argued that the evaluations were premature. With respect to Fitzpatrick's evaluation, counsel stated, if the Board found a violation with respect to the timing of the evaluations, the respondent was content to accept the rating given Fitzpatrick by Bradfield i.e., "satisfactory" and likewise accept the ratings given by Bradfield to Kuz and Rushton.

13. Counsel for the complainants reviewed the evidence and the Board's jurisprudence relating to the statutory "freeze" in section 79 of the Act and the other unfair labour practices alleged. Given that submissions by both counsel were in writing, the Board sees no need to list the cases cited. Counsel submitted the evidence did not support the respondent's assertion with respect to delaying the annual review to the anniversary of an employee's promotion. It was also contended that Hanchar lacked credibility as a witness both regarding the "policy" and as to Fitzpatrick's performance. With respect to the downgrading, counsel asserted that it was least in part as a result of Fitzpatrick's union support and activities. Finally, it was submitted that a negative inference should be drawn from the failure of the respondent to call Bradfield and Khan.

14. The Board first deals with the alleged freeze violation. It is useful to set out the following passage from *Simpsons Limited*, [1985] OLRB Rep. Apr. 594:

23. That section 79 is intended to maintain the status quo, to provide a period of stability while the parties are establishing their collective bargaining relationship or "renewing" that relationship by negotiating another collective agreement, is a sentiment often affirmed by the Board. The classic exposition of the parameters imposed on employer conduct during the freeze is the "business as before" formula in *Spar Aerospace*, *supra*. That formula has been referred to in virtually every case which since has considered section 79. The cases also confirm that section 79 is a "strict liability" provision in that anti-union animus is not a relevant factor.

24. The interpretation of section 79 in the context of particular fact situations, however, has seldom proven simple or straightforward. The Board in *Simpsons*, *supra*, referred to a passage in *Sunnycrest Nursing Home Limited*, [1982] OLRB Rep. Feb. 261 which it is appropriate to repeat here:

The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless.

25. And, as stated in *Grey Owen Sound*, *supra*, at paragraph 22:

The Board, in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, articulated a "business as before" rule during the freeze period. In essence, the Board decided that the legislative intent of the freeze was "to maintain the prior pattern of the employment relationship in its entirety." (See paragraph 19 of the decision). One problem in a first agreement situation is that the parties are in transition from a situation of unrestricted management's rights to one in which collective bargaining will result in some shift in the balance of power as between employer and employees. It is

often very difficult in such situations to ascertain what the pattern of the employment relationship was.

26. Section 79(2) freezes the wage rates, other terms and conditions of employment, rights, duties and privileges of the employees and the rights, privileges and duties of employers for the period specified. Most of the “freeze” cases have arisen in the context described by the above quotation from *Grey Owen Sound*, that is, the transition from unrestricted management rights to a collective bargaining regime wherein those management rights are limited to a greater or lesser extent. In this context, the cases have discussed [sic] [focussed] on the “rights” of employer versus the “privileges” of the employees. In other words, the statute freezes employees’ privileges and it is the scope given to the employees’ privileges which circumscribes the otherwise unlimited reach of employer rights.

27. Before the transition to a collective bargaining relationship, then, the doctrine of management rights is so broad, so all-embracing that there need be no recourse to employer privileges in the context of section 79(2). Once the transition is complete, however, and the freeze arises when the parties are bargaining for a renewal agreement, there may well be found employer “privileges”. In *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, for example, the Board held that a union had waived certain rights under its collective agreement and could not adopt a different posture during the freeze.

28. The Board could have interpreted section 79 so as to freeze the precise conditions extant at the time the statutory provision was triggered. The Board, though, has consistently rejected that approach as an unreasonable interpretation of the legislation. In the Board’s view, such an interpretation would effectively paralyze an employer’s operations for the duration of the statutory freeze, a period which could be quite lengthy. In effect, the “business as before” formulation in *Spar Aerospace*, *supra*, was the Board’s response to too expansive a view of employee privileges. To paraphrase *Spar Aerospace*, the employer’s right to manage its operation was maintained subject to the condition that the operation conform to the pattern established when the freeze was triggered.

29. “Business as before” is a “slippery” concept to apply to specific fact situations. The focus of the test is the “pattern of operations”, the employer’s “practice”. Certainly, where the “practice” is accurately embodied in an employer’s policy manual, the application of “business as before” has been relatively straightforward: *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609. There have been other instances where a practice has been so well entrenched as to be beyond dispute: *Spar Aerospace*, *supra*, with respect to annual merit and annual cost of living increases. On the other hand, the “increased parking fee” cases illustrate the difficulty in looking for a pattern: see *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98, and the cases cited therein, including *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764 and *Ottawa General Hospital*, September 1984, unreported, File No. 0965-84-U(B). Does “business as before” require annual adjustments to parking fees, equal increases in fees, regular adjustments, any charge to employees for parking, or, is what is frozen the actual rate in place at the time of the freeze? The cases generally reject the “actual rate” at the time of the freeze and uphold adjustments to rates. However, the cases reveal the difficulty of looking at a “pattern” or “business as before” to measure employees’ privileges.

30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer’s operation is relevant to assess the impact of the freeze. There are also “first time” events and it is with respect to that category that the “business as before” formulation is not always helpful in measuring the scope of employees’ privileges. Some “first time” events have been readily rejected by the Board, where, for example, the employer has instituted parking fees for the first time during the freeze: see *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; *St. Joseph’s Hospital*, September 1984, unreported, File No. 0965-84-U(A). On the other hand, the Board has upheld an employer’s right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision): *Simpsons*, *supra*; *Burlington Carpet Mills*, *supra*; *The Winchester Press*, *supra*; *Grey Owen Sound*, *supra*; *Deacon Brothers*, *supra*; *Airline (Malton) Credit Union*, *supra*. This right has been confirmed even where the first instance of layoff occurred during the freeze (see *Grey Owen Sound*, *supra*; *The Winchester Press*, *supra*; and where the layoffs had occurred elsewhere in the employer’s operation but not at the specific

location in question (see *Simpsons, supra*). The respondent in the instant case cited *Corporation of the Town of Petrolia, supra*, for the proposition that the employer may also contract out work for the first time during the freeze.

31. Instead of concentrating on “business as before”, the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focussing on the “reasonable expectations” of employees. The “reasonable expectations” approach, in the Board’s opinion, responds to both categories of events caught by the freeze, integrates the Board’s jurisprudence and provides the appropriate balance between employer’s rights and employees’ privileges in the context of the legislative provisions.

32. “Reasonable expectations” language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia, supra*; *Scarborough Centenary Hospital, supra*; *Oshawa General Hospital, York-Finch Hospital, supra*; *St. Mary’s Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited* [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board’s view, the reasonable expectations of employees as the appropriate measure of the employees’ privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The “reasonable expectations” approach clearly incorporates the “practice” of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, “benefits”, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The “reasonable expectations” test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would “reasonably expect” such an occurrence during the freeze. The Board in *Simpsons, supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

34. The “reasonable expectations” approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze: *Le Patro d’Ottawa*, [1983] OLRB Rep. Feb. 244. The Board considers that the upholding of the right to contract out during the freeze period in *Corporation of the Town of Petrolia, supra*, does not establish an unrestricted right of the employer to contract out work during the freeze but, rather, recognizes that the employer in that case had embarked on a programme leading to the contracting out well in advance of the freeze and that the employees would reasonably have been aware of his programme in the circumstances (see para. 20, in particular).

35. Finally, the “lay-off” cases are consonant with the “reasonable expectations” approach. Very few, if any, work forces are entirely static; fluctuations in the size of the staff complement and its composition are the norm. Employers are generally expected to respond to changing economic conditions through the hiring, termination and attrition of employees. It is in this sense that it is “reasonable” for employees to expect an employer to respond to a significant downturn in the business with layoffs (or terminations) even where such layoffs are resorted to for the first time during the freeze. The magnitude of the layoffs, of course, must be proportional or relative to the severity of the economic circumstances. Economic justification must be proven where relied on and there must be an absence of anti-union animus. It must also be stressed that, while the expectation of layoffs does not initially depend on the specific history of the employer’s operation, there might well be specific evidence with respect to that employer which would negate the otherwise usual “reasonable expectation” of layoffs in response to an economic downturn.

36. The “reasonable expectations” approach also distinguishes between layoffs and contracting

out. Where there was a pattern of contracting out, of course, there would be no violation of section 79 where work was contracted out during the freeze. However, in the Board's opinion, while an employee would reasonably expect a layoff where there was no "demand", i.e., where there was an economic downturn, an employee would not reasonably expect that the work would continue to be performed for the benefit of the employer's operation but through contracting out. This is not to say that the employer does not have the right to contract out work during non-freeze periods, except as limited by a collective agreement. During the freeze, however, and unless there is a practice of contracting out, the employer's "right" to contract out is limited by the employees' "privilege" of performing the work if the work is to be performed for the benefit of the employer's operation. Contracting out is merely one of the ways an employer might otherwise increase productivity or efficiency which is caught by the freeze; reducing wages, instituting parking fees, ignoring its policy manual are other means of achieving such goals which are proscribed by the statutory provision.

15. In the Board's view, it was a reasonable expectation of the employees that an annual review would be conducted on the anniversary date of hiring regardless of whether there had been a promotion in the interim. The hiring letter and the employee manual did not refer to a postponement of a review until the anniversary date of a promotion. Hanchar had indicated in May 1985, at a meeting with the department employees, that the reviews were separate and did not assert that was not the case when he had an opportunity to do so in response to Kuz's memo in August 1985. The reviews themselves were initiated by Bradfield for the three complainants at the appropriate period in relation to their employment anniversary date.

16. Moreover, the Board is also of the opinion that the "exception" to the company policy as asserted by Hanchar, simply did not exist. In addition to the matters just referred to, several other factors should be noted. The staff manual, on its face, does not refer to the "exception", in marked contrast to paragraph 8 of that document dealing with salaried employees which does so. Bradfield may have been relatively new as a supervisor; however, Khan was not. He participated in the evaluations without raising a question of "prematurity". The Board notes, too, that neither Bradfield nor Khan testified. More importantly, though, Hanchar himself had knowledge of the reviews and, indeed, downgraded Fitzpatrick, without ever indicating a concern that the reviews were untimely until after the complaint was filed with the Board. Finally, the company submitted no documentary material to substantiate this policy (beyond the staff manual already dealt with), particularly, employee evaluations corresponding to the anniversary of the promotion date rather than the anniversary date of hire.

17. Beyond referring to the *Simpsons* decision, *supra*, and the cases cited therein, the Board does not consider it useful to elaborate on the jurisprudence further. The Board notes the references in the submissions of counsel for the complainants. It may well be that the company and/or Hanchar himself decided that the policy of annual review on the anniversary date of hire irrespective of intervening promotions was not sensible. The Board need not conclusively determine the respondent's motivation with respect to the alleged violation of section 79, as this section does not depend upon a finding of anti-union animus. What the Board does conclude, however, is that the company changed its policy with respect to annual performance reviews during the "freeze" period and, thus, violated section 79 of the Act.

18. Counsel for the respondent indicated that the company was content with Bradfield's evaluation of Fitzpatrick if the Board found that there had been a violation of the "freeze" period. The Board has done so but, nonetheless, considers it appropriate to deal with the Fitzpatrick evaluation. Before the union organizing campaign, Fitzpatrick was regarded as a good employee, particularly by Hanchar himself, who had publicly commented about Fitzpatrick's work in positive terms. It was also apparent that Fitzpatrick was a key union organizer who was then elected local president and participated in negotiations. Bradfield also regarded Fitzpatrick positively although

she had noted the time spent on non-company business. The Board accepts Fitzpatrick's evidence as to the casual atmosphere in the department regarding "chatter". The Board also accepts Kuz's evidence that Fitzpatrick usually responded to queries initiated by other employees rather than seeking out those individuals, that that time so spent represented about four or five percent of Fitzpatrick's work day and that Fitzpatrick generally was a conscientious employee who often worked lunch hours to meet deadlines. What the Board does not accept is Hanchar's explanation for downgrading Fitzpatrick. Quite simply, Hanchar's story is just not believable. To give one example, Hanchar asserted he became involved with Fitzpatrick's evaluation as the original was not sufficiently comprehensive and left out aspects, such as, attitude. Yet, the evaluation document is not brief but covers numerous aspects of performance, including attitude, giving opportunity for self-evaluation by the employee and supervisory evaluations on each item. Only one other reference to Hanchar's testimony need be made. Hanchar also indicated he became involved with Fitzpatrick's review because of his own knowledge of Fitzpatrick prior to Bradfield's arrival in the department. The October 9, 1985 from Hanchar attached to the performance review notes this specifically. Yet, during that earlier period, Fitzpatrick was repeatedly and publicly praised by Hanchar himself. In the Board's view, there can be no other reasonable explanation that the downgrading was the result of Fitzpatrick's union activities, contrary to section 66 of the Act: *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745. In the circumstances, the Board does not regard it as useful to deal separately with the alleged violations of sections 64, 70 and 80.

19. Thus, the Board:

- (i) declares that the respondent violated sections 79 and 66 of the Act by denying wage increases on the anniversary date of the employees' hiring and by downgrading the satisfactory rating in Fitzpatrick's performance review;
- (ii) directs the respondent, for the period of the statutory freeze, to continue its practice of conducting performance reviews on the employment anniversary date irrespective of a promotion in the interim and to pay wage adjustments based on the evaluations, including retroactive reviews and wage adjustments (with interest calculated per (v) below) as appropriate. That is, this direction covers persons in the bargaining unit, in addition to the three grievors, who may have been affected by the "delayed" review pursuant to the company's purported policy. For clarity, the Board notes the undisputed company policy that, for employees hired prior to February 1, 1983, their deemed anniversary date is February 1, 1983;
- (iii) directs the respondent to post the attached Board notice for sixty (60) consecutive working days.

Further, specifically with respect to the grievors themselves, the Board

- (iv) directs the company to restore the "satisfactory" rating given Fitzpatrick by Bradfield and to remove any additional evaluation documentation in respect of this review other than the standard performance evaluation form, such as, Hanchar's memo of October 9, 1985;
- (v) pay to Fitzpatrick, Rushton and Kuz, as at their respective employment anniversary dates, the wage adjustments to which they would have been entitled on the basis of their performance reviews. Compensation is to

include interest calculated according to the usual principles enunciated in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35 (Board Practice Note 13).

20. The Board remains seized to resolve any dispute as to the implementation of this award.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT BY DENYING WAGE INCREASES ON THE EMPLOYMENT ANNIVERSARY DATE OF THE THREE GRIEVORS (S. FITZPATRICK, E. RUSHTON, A. KUZ) AND BY DOWNGRADING THE PERFORMANCE EVALUATION OF S. FITZPATRICK. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL RESTORE THE "SATISFACTORY" RATING GIVEN S. FITZPATRICK IN HIS PERFORMANCE EVALUATION AND REMOVE ANY ADDITIONAL EVALUATION MATERIAL IN RESPECT OF THAT REVIEW.

WE WILL PAY TO S. FITZPATRICK, E. RUSHTON AND A. KUZ, AS AT THEIR RESPECTIVE EMPLOYMENT ANNIVERSARY DATES, THE WAGE ADJUSTMENT (WITH INTEREST) TO WHICH THEY WOULD HAVE BEEN ENTITLED ON THE BASIS OF THEIR PERFORMANCE REVIEWS.

WE WILL CONTINUE, FOR THE PERIOD OF THE STATUTORY FREEZE, OUR PRACTICE OF CONDUCTING PERFORMANCE REVIEWS AND IMPLEMENTING WAGE ADJUSTMENTS ON THE EMPLOYMENT ANNIVERSARY DATE IRRESPECTIVE OF A PROMOTION IN THE INTERIM.

WE WILL CONDUCT RETROACTIVE PERFORMANCE REVIEWS AND PAY WAGE ADJUSTMENTS (WITH INTEREST) AS REQUIRED TO COMPLY WITH THE COMPANY PRACTICE JUST STATED.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

W. H. SMITH CANADA LTD.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2099-84-R: Syndicat Quebecois De L'Imprimerie Et Des Communications Local 145, (Applicant) v. Journal Le Droit, division du groupe UniMedia Inc., (Respondent).

Unit: "all dependent contractors of the respondent employed as drivers in and out of Ottawa engaged in the delivery of newspapers, save and except supervisors, persons above the rank of supervisor and persons from whom any trade union held bargaining rights as of October 31, 1984." (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2156-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Beacon Vanier Taxi (1984) Co. Ltd., Eastway Taxi, Bob Labrie Taxi, (Respondents).

Unit: "all drivers of the Employer driving under the "Eastway" roof sign encompassing drivers of the Employer, single plated car owners, single plated car lessees, drivers of fleet owners dependent on the Employer's dispatch system save and except dispatch staff supervisors, fleet owners and persons above the rank of dispatch staff supervisors and fleet owners." (14 employees in unit).

3001-84-R: Ironworkers District Council of Ontario, (Applicant) v. Rapid Forming Inc., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 494, (Intervener).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foreman and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foreman and persons above the rank of non-working foreman." (2 employees in unit).

0202-85-R: Ontario Public Employees Union, (Applicant) v. Corbrook Sheltered Workshop and Scarbrook Enterprises, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Toronto, save and except production supervisors, persons above the rank of production supervisor, secretary/bookkeeper to the executive director, secretary/bookkeeper to the administrator, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (23 employees in unit).

0751-85-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Co-Fo Concrete Forming Construction Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (31 employees in unit).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (31 employees in unit).

1335-85-R: Ontario Public School Teachers' Federation, (Applicant) v. Essex County Board of Education, (Respondent).

Unit: "all occasional teachers employed by the Essex County Board of Education in its elementary panel, save and except persons in bargaining units for which any trade union held bargaining rights as of August 28, 1985." (102 employees in unit). (*Having regard to the agreement of the parties*).

1720-85-R: Labourers' International Union of North America, Local 1059, (Applicant) v. The McBride Group Inc., (Respondent).

Unit: "all construction labourers employed by the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

2030-85-R: Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Green Gables Manor Incorporated, (Respondent).

Unit: "all employees of the respondent in the township of Whitchurch-Stouffville, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office and clerical staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

2588-85-R: Ontario Public School Teachers' Federation, (Applicant) v. The Frontenac County Board of Education, (Respondent).

Unit: "all occasional teachers, as defined in *The Education Act*, employed by the respondent in its elementary panel in the County of Frontenac, save and except employees in bargaining units for which any trade union held bargaining rights as of January 23, 1986." (241 employees in unit). (*Having regard to the agreement of the parties*).

2623-85-R: International Brotherhood of Electrical Workers, Local Union 105, (Applicant) v. Morell Electric Ltd., (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

2718-85-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Warrington Products Inc., c.o.b. Cornwall Plastic Products, (Respondent).

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (70 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2861-85-R: Hotels, Clubs, Restaurants & Taverns Employees Union Local 261, (Applicant) v. 547691 Ontario Limited, (Respondent).

Unit: "all employees of the respondent in Kanata employed for not more than twenty-four (24) hours per week, save and except head housekeeper, persons above the rank of head housekeeper, office staff and front desk clerks." (2 employees in unit). (*Having regard to the agreement of the parties*).

2980-85-R: United plant Guard Workers of America, Local 1962, (Applicant) v. York University, (Respondent).

Unit: "all security officers of the respondent in the Department of Security & Safety Services employed to protect the property of York University in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (79 employees in unit). (*Having regard to the agreement of the parties*).

3019-85-R: London and District Service Workers' Union Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. The Ontario Cancer Treatment and Research Foundation, (Respondent).

Unit: "all employees of the respondent at its Thameswood Lodge in London regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor and office and clerical staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

3148-85-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Culinar Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all route salesmen in the employ of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by a certificate of the Board dated September 27, 1985." (23 employees in unit).

3204-85-R: Canadian Transport Workers Union, (Applicant) v. Listowel Transport Lines Limited and J. E. Transport Limited, (Respondents).

Unit: "all employees of Listowel Transport Lines Limited and J. E. Transport Lines Limited working at and out of the terminals in the Municipalities of Cambridge, London, Toronto, Owen Sound, and Hamilton, save and except foremen, persons above the rank of foreman, clerical, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation periods." (207 employees in unit). (*Having regard to the agreement of the parties*).

0009-86-R: United Steelworkers of America, (Applicant) v. Capital Disposal Equipment Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

0043-86-R: Hotel, Clubs, Restaurants & Taverns Employees' Union - Local 261, (Applicant) v. Tan Popo Food Services Ltd., (Respondent).

Unit: "all employees of the respondent at 89 Clarence Street, Ottawa, save and except general manager, persons above the rank of general manager, dining room manager, kitchen manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in unit). (*Having regard to the agreement of the parties*).

0045-86-R: Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union, Local 351, (Applicant) v. Wall-Art Productions Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff." (16 employees in unit). (*Having regard to the agreement of the parties*).

0052-86-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Domtar Inc., (Respondent).

Unit: "all employees of the respondent at its Buntin Reid Paper Division in the Municipality of Ottawa, Carleton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

0057-86-R: Labourers' International Union of North America, Local 506, (Applicant) v. A & A Special Construction Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0074-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Marke Associates (Essex) Ltd., (Respondent).

Unit: "all employees of the respondent in Sandwich South Township, save and except foremen, persons above the rank of foreman, office, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

0075-86-R: Canadian Union of Public Employees, (Applicant) v. The Metropolitan Toronto School Board, (Respondent) v. Group of Employees, (Objectors).

Unit: "all health care assistants employed by the respondent in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and persons for whom any trade union held bargaining rights on the date of application April 8th 1986." (12 employees in unit). (*Having regard to the agreement of the parties*).

0085-86-R: Ontario Nurses' Association, (Applicant) v. Anson General Hospital, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Iroquois Falls, save and except Inservice Co-ordinator, persons above the rank of Inservice Co-ordinator, and persons regularly employed for not more than twenty-four hours per week." (9 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Iroquois Falls, regularly employed for not more than twenty-four (24) hours per week, save and except Inservice Co-ordinator and persons above the rank of Inservice Co-ordinator." (13 employees in unit). (*Having regard to the agreement of the parties*).

0090-86-R: Ontario Public Service Employees Union, (Applicant) v. Trenton Memorial Hospital, (Respondent).

Unit #1: "all paramedical employees of the respondent in the City of Trenton, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of April 9, 1986" (22 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all paramedical employees of the respondent in the City of Trenton regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bar-

gaining rights as of April 9, 1986.” (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0092-86-R: Christian Labour Association of Canada, (Applicant) v. Caressant Care Nursing Home of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in its nursing home in the Township of East Zorra-Tavistock regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, and office and clerical staff.” (40 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0107-86-R: Energy and Chemical Workers Union, (Applicant) v. Petro-Canada Inc., (Respondent).

Unit #1: “all service station employees of the respondent at its Highway 400 Service Centre at King City, Ontario, save and except Shift Supervisor, persons above the rank of Shift Supervisor, persons working in restaurant and food services operation, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all service station employees of the respondent at its Highway 400 Service Centre at King City, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except shift Supervisors, persons above the rank of Shift Supervisor and persons working in restaurant and food services operation. (8 employees in unit). (*Having regard to the agreement of the parties*).

0115-86-R: Labourers’ International Union of North America, Local 1036, (Applicant) v. Crema Furniture Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (16 employees in unit). (*Having regard to the agreement of the parties*).

0116-86-R: Ontario Public Service Employees Union, (Applicant) v. The Reena Foundation, (Respondent).

Unit: “all employees of the respondent employed in Palgrave, Ontario save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (11 employees in unit). (*Having regard to the agreement of the parties*).

0131-86-R: International Union of Bricklayers and Allied Craftsmen, Local 7 Canada, (Applicant) v. Teaphilus Masonry Inc., (Respondent).

Unit #1: “all bricklayers and bricklayers’ apprentices and all stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices and all stonemasons and stonemasons’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

0156-86-R: Labourers’ International Union of North America Local 527, (Applicant) v. Colibri Construction Inc., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institu-

tional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0158-86-R: Ontario Public Service Employees Union, (Applicant) v. Kinark Child and Family Services, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent at Barrie, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, secretary co-ordinator, office staff, house heads, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (29 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent at Barrie, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, secretary co-ordinator, office staff, and house heads.” (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0171-86-R: The Canadian Union of Public Employees, (Applicant) v. 463725 Ontario Limited c.o.b. as Residence St. Francois, (Respondent).

Unit: “all employees of the respondent in the Village of Casselman, save and except supervisors and persons above the rank of supervisor.” (22 employees in unit). (*Having regard to the agreement of the parties*).

0173-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. K V C Construction Limited, (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0174-86-R: Labourers’ International Union of North America, Local 183, (Applicant) v. K V C Construction Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0182-86-R: The Ontario Public School Teachers' Federation, (Applicant) v. The Dryden Board of Education, (Respondent).

Unit: "all occasional teachers employed by the respondent in its elementary panel in the District of Kenora, save and except employees in bargaining units for which any trade union held bargaining rights as of April 18, 1986 being the date of application." (49 employees in unit).

0186-86-R: United Food & Commercial Workers Union, Local 409, chartered by the United Food & Commercial Workers International Union C.L.C.-A.F.L.-C.I.O., (Applicant) v. MacLeod-Stedman Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Town of Dryden, save and except Restaurant Supervisor, persons above the rank of Restaurant Supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in the Town of Dryden, save and except Restaurant Supervisor and persons above the rank of Restaurant Supervisor." (16 employees in unit). (*Having regard to the agreement of the parties*).

0187-86-R: Christian Labour Association of Canada, (Applicant) v. Classics Hamilton Homes for the Aged Inc., (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Grimsby, Ontario, save and except the Director of Nursing and persons above the rank of Director of Nursing." (5 employees in unit). (*Having regard to the agreement of the parties*).

0189-86-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. Ivanhoe Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Toronto, save and except Regional Manager, persons above the rank of Regional Manager, office, clerical and sales staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

0190-86-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Joy Displays Inc., (Respondent).

Unit: "all employees of the respondent at Niagara Falls, save and except foremen, persons above the rank of foreman, office and clerical staff." (10 employees in unit). (*Having regard to the agreement of the parties*).

0191-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Pebra Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (162 employees in unit). (*Having regard to the agreement of the parties*).

0213-86-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. Steinbok Enterprises Limited, c.o.b. as Comfort Inn, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Metropolitan Toronto, save and except assistant managers and persons above the rank of assistant manager, persons employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant managers

and persons above the rank of assistant manager.” (6 employees in unit). (*Having regard to the agreement of the parties*).

0222-86-R: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. KVC Construction Limited, (Respondent).

Unit: “all truck drivers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0245-86-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Wanzl Manufacturing Inc., (Respondent).

Unit: “all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.” (51 employees in unit).

0248-86-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Brockville, (Respondent).

Unit: “all employees of the respondent employed in its arenas, save and except foremen, supervisors, persons above the rank of foreman/supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of April 23, 1986.” (7 employees in unit). (*Having regard to the agreement of the parties*).

0251-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America U.A.W., (Applicant) v. Lakehead Industries Incorporated, (Respondent).

Unit: “all employees of the respondent in Kingsville, save and except foremen, persons above the rank of foreman, office and sales staff.” (37 employees in unit). (*Having regard to the agreement of the parties*).

0262-86-R: London and District Service Workers Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Township of McGillivray, (Respondent).

Unit: “all employees of the respondent in the Township of McGillivray, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (4 employees in unit). (*Having regard to the agreement of the parties*).

0265-86-R: Service Employees International Union Local 204, (Applicant) v. Extendicare Health Services Inc., (Respondent) v. Para-med Health Services, (Objectors).

Unit #1: “all employees of the respondent at its Retirement Home(s) in the Municipality of Metropolitan Toronto save and except professional medical staff, supervisors, persons above the rank of supervisor, office and clerical staff, those persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (12 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its Retirement Home(s) in the Municipality of Metropolitan Toronto save and except professional medical staff, supervisors, persons above the rank of supervisor, and office and clerical staff.” (11 employees in unit). (*Having regard to the agreement of the parties*).

0273-86-R: United Steelworkers of America, (Applicant) v. C.E. Springer & Company Limited, (Respondent).

Unit: “all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office and sales staff, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of April 28, 1986.” (20 employees in unit). (*Having regard to the agreement of the parties*).

0296-86-R: The Ottawa Typographical Union, Local 102, (Applicant) v. The Citizen, A Division of Southam Inc., (Respondent).

Unit: “all employees of the Mailroom of the respondent, in the City of Ottawa, employed for not more than twenty-four (24) hours per week, save and except foremen, persons above the rank of foreman, and employees in bargaining units for which any trade union held bargaining rights as of April 28, 1986.” (245 employees in unit). (*Having regard to the agreement of the parties*).

0317-86-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. VS Services Ltd., (Respondent).

Unit: “all employees of the respondent at its Domglas Inc. operation in Hamilton, save and except supervisors and persons above the rank of supervisor.” (7 employees in unit). (*Having regard to the agreement of the parties*).

0325-86-R: United Steelworkers of America, (Applicant) v. Butterfield Division, Litton Canada Inc., (Respondent).

Unit: “all employees of the respondent at Smiths Falls, Ontario, save and except foremen, persons above the rank of foreman, office, sales and clerical staff and students employed during the school vacation period.” (140 employees in unit). (*Having regard to the agreement of the parties*).

0328-86-R: Construction Workers Local 53 affiliated with the Christian Labour Association of Canada, (Applicant) v. E. S. C. (Myles) Inc., (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit.)

0329-86-R: Construction Workers Local 53 affiliated with the Christian Labour Association of Canada, (Applicant) v. E. S. C. (Myles) Inc., (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2997-85-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Windsor Hospital Linen Services Incorporated, (Respondent) v. Service Employees Union, Local 210, (Intervener).

Unit: “all employees of the respondent at Windsor save and except supervisors, persons above the rank of supervisor and office staff.” (44 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		44
Number of persons who cast ballots	42	
Number of ballots marked in favour of applicant		13
Number of ballots marked in favour of intervener		29

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2564-85-R: Mary Lesley Fodor, (Applicant) v. Canadian Union of Public Employees Local 2484, (Respondent) v. Thomas Toddlers Daycare, (Intervener).

Unit: "all employees of Thomas Toddlers Limited at Metro Toronto, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	11	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		11

3061-85-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Canada Millwrights Limited, (Respondent) v. International Association of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union No. 834, (Intervener).

Unit: "all employees employed by the respondent at its shop or shops in the Municipality of Metropolitan Toronto and the City of Oshawa, Ontario, including those engaged in production and/or normal maintenance work and to work done by such employees save and except foremen, persons above the rank of foreman, office or clerical staff, draftsmen, watchmen, guards, persons engaged in major extensions or major remodelling of the Company's premises and persons engaged in field erection work." (12 employees in unit).

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		10
Number of ballots marked in favour of intervener		0
Ballots segregated and not counted		1

Applications for Certification Dismissed Without Vote

2093-85-R: Service Employees union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. 638490 Ontario Limited, (Respondent). (5 employees in unit).

2183-85-R: Bakery, Confectionary and Tobacco Workers International Union, Local 181, (Applicant) v. Dough Delight Ltd., (Respondent) v. Group of Employees, (Objectors). (156 employees in unit).

2400-85-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Walloy Excavating Company Limited, (Respondent). (21 employees in unit).

0128-86-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Lakeview Development of Canada Ltd., and King St. Hamilton Hotel Limited c.o.b. as Sheraton Hamilton, (Respondent) v. Group of Employees, (Objectors). (101 employees in unit).

0129-86-R: Hotel Employees & Restaurant Employees Union, Local 75, (Applicant) v. Howard Johnson - East Hotel and Restaurant, (Respondent). (76 employees in unit).

0134-86-R: The Employee's Association of Allied Masonry, (Applicant) v. Allied Masonry, (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 6, (Intervener). (4 employees in unit).

0188-86-R: United Brotherhood of Carpenters & Joiners of America, Local Union 27, (Applicant) v. Ideal Railings Ltd., (Respondent). (24 employees in unit).

0249-86-R: Canadian Union of Public Employees, (Applicant) v. St. Vincent de Paul Hospital, (Respondent). (69 employees in unit).

0327-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees Interna-

tional Union, Local 351, (Applicant) v. Holiday Inn of Cornwall of the Commonwealth Holiday Inn of Canada Limited, (Respondent) v. Group of Employees, (Objectors). (20 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2960-85-R: Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. NCR Canada Ltd. - NCR Canada Ltee, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Field Engineering Division in the Province of Ontario save and except supervisors, persons above the rank of supervisor, remote support professional engineers, office and sales staff." (202 employees in unit).

Number of names of persons on revised voters' list		211
Number of persons who cast ballots	201	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	170	
Number of segregated ballots cast by persons whose name appear on voters' list	31	
Number of ballots marked in favour of applicant		71
Number of ballots marked against applicant		99
Ballots segregated and not counted		31

3045-85-R: Ontario Nurses' Association, (Applicant) v. Victorian Order of Nurses, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the United Counties of Leeds and Grenville, save and except senior nurse and persons above the rank of senior nurse." (26 employees in unit).

Number of names of persons on list as originally prepared by employer		26
Number of names of persons who cast ballots	25	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		16

3094-85-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. B & E Furniture Manufacturing Company Limited, (Respondent).

Unit: "all employees of the respondent at Weston, Ontario save and except foremen, persons above the rank of foreman, designers, office and sales staff and students employed during the school vacation period." (85 employees in unit).

Number of names of persons on list as originally prepared by employer		85
Number of persons who cast ballots	79	
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		45

3167-85-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Therm-O-Disc (Canada) Limited, (Respondent).

Unit: "all employees of the respondent in St. Thomas, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (353 employees in unit).

Number of names of persons on list as originally prepared by employer		353
Number of names of persons who cast ballots	331	
Number of ballots marked in favour of applicant		95
Number of ballots marked against applicant		236

Applications for Certification dismissed Subsequent to a Post-Hearing Vote

2234-85-R: United Steelworkers of America, (Applicant) v. Aurora Steel Service Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Aurora save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period as of March 21, 1986." (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		22
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		11
Ballots segregated and not counted		2

2380-85-R: Graphic Communications International Union, (Applicant) v. The Globe & Mail, Division of Canadian Newspapers Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the newspaper mailing room at 444 Front Street West, in the Municipality of Metropolitan Toronto, save and except assistant foremen, persons above the rank of assistant foreman, and employees in bargaining unit which any trade union held bargaining rights as of December 20, 1985." (39 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		35
Number of persons who cast ballots	34	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		17

2385-85-R: Retail, Wholesale and Department Store Union, (Applicant) v. Sears Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its service centre at 1920 Albion Road, Rexdale, Ontario save and except supervisors, persons above the rank of supervisor, security staff, personnel staff, nurse, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (259 employees in unit).

Number of names of persons on revised voters' list		245
Number of persons who cast ballots	223	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		103
Number of ballots marked against applicant		119

2554-85-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Spun Stell Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Strathroy, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (136 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		125
Number of persons who cast ballots	117	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		49
Number of ballots marked against applicant		67

2630-85-R: United Steelworkers of America, (Applicant) v. GNB Batteries (Canada) Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent in the Town of Fort Erie, save and except

supervisors, persons above the rank of supervisor and confidential secretary to the President.” (20 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		12
Ballots segregated and not counted		3

2994-85-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant) v. Teledyne Canada Metal Products, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Woodstock, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (67 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		68
Number of persons who cast ballots	68	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		67
Number of segregated ballots cast by persons whose name appear on voters' list		1
Number of ballots marked in favour of applicant		29
Number of ballots marked against applicant		39

3012-85-R: Textiles Processors, Service Trades, Health Care, Professional and Technical Employees, International Union, Local 351, (Applicant) v. A.M.D. Automation Mold & Die Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the City of Cornwall, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, quality control, material mixer, homeworkers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (59 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voter's list		59
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		30
Ballots segregated and not counted		3

Applications for Certification Withdrawn

1093-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. Peel Board of Education, (Respondent).

2737-85-R: Christian Labour Association of Canada, (Applicant) v. Morell Electric Ltd., (Respondent) v. International Brotherhood of Electrical Workers, Local Union 105, (Intervener).

3150-85-R: Syndicat des Employes de Scierie Trifluvienne, Local 261 Inc., (Applicant) v. Modern Windows V.H. Inc., (Respondent).

0091-86-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Custom Pharmaceuticals Ltd., (Respondent).

0224-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Williams Cartage, (Respondent).

0231-86-R: Sheet Metal Workers' International Association Local Union #540, (Applicant) v. Dominion Metalware Industries Limited, (Respondent).

0364-86-R: International Association of Machinists and Aerospace Workers Thunder Bay Lodge 1120, (Applicant) v. Breeny's Auto Body Shop Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1398-83-R: International Brotherhood of Electrical Workers, Local 1687, (Applicant) v. F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction, and 556631 Ontario Limited carrying on business as G.P. Construction, (Respondents). (*Granted*).

0657-84-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Brink's Canada Limited A.T.M. Automatic Teller Machines Services, Ltd., (Respondents). (*Granted*).

2706-84-R: United Steelworkers of America, (Applicant) v. Swingline of Canada, Ltd., Swingline/Rexel Inc., Swingline Inc. and Rexel Inc. and Rexel Office Products Limited and American Brands Inc. and Marson Limited and Wilson Jones Limited and Canadian Staples Company, (Respondents). (*Dismissed*).

2103-85-R: International Brotherhood of Painters and Allied Trades, Local 200, (Applicant) v. 140341 Canada Limited and Killarney Glass & Aluminum Ltd., (Respondent). (*Withdrawn*).

2831-85-R: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. A. Volpatti Plastering & Construction Ltd. and Ramsel Construction & Investments Ltd., (Respondents). (*Granted*).

3089-85-R: Peterborough Typographical Union, Local 248, (Applicant) v. Northumberland Publishers Limited, the Cobourg Daily Star, the Port Hope Evening Guide, the Campbellford Herald, the Newcastle Reporter, and the Colborne Chronicle, (Respondents). (*Withdrawn*).

0181-86-R: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ragno Excavating Ltd. and Palmic Limited, (Respondents). (*Withdrawn*).

0266-86-R: Service Employees International Union Local 204 Affiliated with the S.E.I.U. A.F. of L., C.I.O., C.L.C., (Applicant) v. Extendicare Health Care Services Inc. and Para-med Health Services, (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

1399-83-R: International Brotherhood of Electrical Workers, Local 1687, (Applicant) v. F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction, and 556631 Ontario Limited carrying on business as G.P. Construction, (Respondents). (*Granted*).

2582-84-R: Swingline/Rexel Inc., (Applicant) v. United Steelworkers of America, (Respondent). (*Granted*).

0289-85-R: International Beverage Dispensers and Bartenders Union, Local 280, (Applicant) v. 651 Queen W. Investments Ltd., Harvey Weisfield and Alan Charney, (Respondents). (*Granted*).

1177-85-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Inscan Contractors (Ontario) Inc. and Advanced Insulation Covers A.I.C. Inc., (Respondents). (*Withdrawn*).

1270-85-R: James Meikle and Tom Hinton and a Group of Employees, (Applicant) v. Great Atlantic and

Pacific Tea Company Limited and Retail, Wholesale & Department Store Union, Local 414, (Respondents) v. Dominion Stores Limited/Willett Foods Limited, (Intervener). (*Granted*).

2391-85-R: Labourers International Union of North America, Local 527, (Applicant) v. Uniform Development Corporation Uniform Developments & Leasing Limited Uni-Form Builders Limited, (Respondents). (*Withdrawn*).

2869-85-R: United Food and Commercial Workers International Union, Locals 175 and 633, (Applicant) v. New Dominion Stores Inc. The Great Atlantic & Pacific Company of Canada Ltd., (Respondent) v. United Steelworkers of America, (Intervener). (*Granted*).

2949-85-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Mr. Albert Tam c.o.b. as Steak & Burger and Meeting Place Lounge, (Respondent). (*Withdrawn*).

0470-86-R: United Food and Commercial Workers International Union, Local 175 and 633, (Applicant) v. New Dominion Stores Inc., The Great Atlantic & Pacific Company of Canada Limited, (Respondent). (*Withdrawn*).

UNION SUCCESSOR RIGHTS

1433-85-R: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Metro Carpentry Ltd., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2557-85-R: Carol P. Mckenzie, George Eizenga, (Applicants) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880, (Respondent) v. The Corporation of the Township of Bosanquet, (Intervener).

Unit: “all office and clerical employees of The Corporation of the Township of Bosanquet save and except clerk treasurer, persons above the rank of clerk treasurer, confidential secretary to clerk treasurer and building inspector.” (3 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

2770-85-R: Bert Kolmel, (Applicant) v. Retail, Wholesale and Department Store Union, and its Local 414, AFL:CIO:CLC:, (Respondent) v. K-W Food Services, Division of Willett Foods Limited, (Intervener).

Unit: “all employees of the Company employed at its Wholesale Distribution Centre located in Kitchener, Ontario, save and except office and sales staff, Team Managers and employees above the rank of Team Managers.” (44 employees in unit). (*Dismissed*).

2816-85-R: Employees of Diverse Blending Represented by William Petherick, (Applicant) v. United Rubber, Cork, Linoleum and Plastic Workers of America AFL-CIO, CLC, (Respondent) v. Diverse Blending Limited, (Intervener).

Unit: “all employees of Diverse Blending Limited, in its plant, in Orillia, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff and students employed during the school vacation period.” (36 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		36
Number of persons who cast ballots	27	
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		22

2833-85-R: Claire Ellen Pyke, (Applicant) v. Service Employees International Union, Local 204, (Respondent) v. Trailermaster Freight Carriers Limited c.o.b. Atripco Delivery Service, (Intervener).

Unit: "all employees of Trailer Master Freight Carriers Limited in Metropolitan Toronto save and except sales staff, office staff, warehouse staff, tracers, dispatchers, supervisor, persons regularly employed for not more than 24 hours a week and students employed during the school vacation period." (67 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		67
Number of persons who cast ballots	64	
Number of ballots marked in favour of respondent		25
Number of ballots marked against respondent		37
Ballots segregated and not counted		2

0164-86-R: Tony Duynhoven, Tony DeVito, and Thomas Wooton, (Applicant) v. International Union of Bricklayers and Allied Craftsmen, Local 6 in Windsor, (Respondent) v. Allied Masonry Contractors, (Intervener). (3 employees in unit). (*Dismissed*).

0270-86-R: Cal Herd, (Applicant) v. The International Brotherhood of Electrical Workers, Local 105, (Respondent). (2 employees in unit). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0545-86-U: Monarch Fine Foods Company Limited, (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, Randy Doner; Michael Reid; Arthur Morley; Ronald Debartok, Steve Sajbic and Alice Gralek, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0429-86-U: Computer Logics Limited, (Applicant) v. Local Union 675 United Brotherhood of Carpenters and Joiners of America and Gus Simone, (Respondents). (*Withdrawn*).

0431-86-U: Garcon Construction Inc., Jay Electric Limited and Metropolitan Toronto Apartment Builders Association, (Applicants) v. A. Kouroukis, K. Kipling, H.B. Katis, V. Sourtzis, E. Bravos, D. Simpson and International Brotherhood of Electrical Workers, Local 353, (Respondents). (*Withdrawn*).

0434-86-U: Doef's Ironworkers Ltd., (Applicant) v. Danial Nash, Ralph Harper, James Pollock and Richard Thompson, (Respondents). (*Granted*).

0445-86-U: Konvey Construction Company Limited, Simplex Electric and Metropolitan Apartment Builders Association, (Applicants) v. Mario Bordin, Ted Dimitroulakos, Rudy Skoko and International Brotherhood of Electrical Workers, Local 353, (Respondents). (*Withdrawn*).

0446-86-U: Konvey Construction Company Limited and Metropolitan Toronto Apartment Builders Association, (Applicants) v. John Tzounetouris and International Brotherhood of Electrical Workers, Local 353, (Respondents). (*Withdrawn*).

0461-86-U: V K Mason Construction Ltd., (Applicant) v. International Brotherhood of Electrical Workers, Local 586 and Jamie Creighton and Larry Capron, (Respondents). (*Withdrawn*).

0462-86-U: Ellis-Don Limited, (Applicant) v. International Brotherhood of Electrical Workers, Local 586 and Thomas Moffett, (Respondents). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0916-84-U: International Brotherhood of Electrical Workers, Local 1687, (Complainant) v. F.D.V. Construction Limited, 515112 Ontario Limited carrying on business as Bluebird Construction, 556631 Ontario Limited carrying on business as G.P. Construction, William Moffat and Graham Pope, (Respondents). (*Granted*).

2891-84-U: Gary Janes, (Complainant) v. Retail, Commercial and Industrial, Union, Local 206, (Respondent). (*Dismissed*).

0056-85-U: James Meikle (et al. see attached list of complainants), (Complainants) v. Retail, Wholesale & Department Store Union Local 414 and the Great Atlantic and Pacific Tea Company of Canada Limited, (Respondents), v. Edward Jenner and John Yuill, (Intervener #1) v. Dominion Stores Limited, (Intervener #2). (*Dismissed*).

0058-85-U: Tom Hinton, (Complainant) v. Retail, Wholesale & Department Store Union and Don Collins, (Respondent) v. A Group of Employees at the Toronto Area Great Atlantic & Pacific Company Limited Warehouses, (Intervener). (*Dismissed*).

0616-85-U: Erwin Fischer, (Complainant) v. Retail, Wholesale and Department Store Union, Local 1688, (Respondent) v. 121571 Canada Inc. carrying on business as Blueline Airporter formerly Alpha Airporter, (Intervener). (*Dismissed*).

0721-85-U: Public Service Alliance of Canada, (Complainant) v. Forintek Canada Corp. and Jacques Carette, (Respondents). (*Granted*).

1129-85-U: Mike Brinovec, (Complainant) v. Sheet Metal Workers International Association, Local 575, (Respondent). (*Dismissed*).

1304-85-U: Loi Kia Chia, (Complainant) v. International Union United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW CLC) Local 1967, (Respondents) v. McDonnell Douglas Canada Limited, (Intervener). (*Dismissed*).

1307-85-U: Canadian Paperworkers Union, (Applicant) v. Faber-Castell Canada Limited, (Respondent). (*Withdrawn*).

1664-85-U: United Steelworkers of America, (Complainant) v. Easy-Plan Furniture Ltd., (Respondent). (*Withdrawn*).

1875-85-U: International Association of Bridge, Structural & Ornamental Ironworkers, Local 834, (Complainant) v. Taunton Fabricating Ltd., (Respondent). (*Granted*).

2020-85-U: United Garment Workers of America, (Complainant) v. L. Davis Textiles Co. Limited, (Respondent). (*Withdrawn*).

2038-85-U: Carl Oezhan, (Complainant) v. Inco Ltd. and United Steelworkers of America, Local 6500, (Respondents). (*Dismissed*).

2052-85-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. MacDonalds Consolidated Limited, (Respondent). (*Dismissed*).

2217-85-U: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. 638490 Ontario Limited and Mr. & Mrs. E. G. Eccles, (Respondents). (*Dismissed*).

2263-85-U; 2264-85-U; 2265-85-U: Fraternite Inter-Provinciale des Ouvriers en Electricite (F.I.P.O.E.) (Com-

plainant) v. Dustbane Enterprises Limited (Dustbane Products Limited), (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

2292-85-U: The Ontario Public Service Employees Union, (Complainant) v. McKechnie Ambulance Service Inc., (Respondent). (*Withdrawn*).

2403-85-U: United Food and Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

2580-85-U: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Complainant) v. J. B. Food Industries Inc., (Respondent). (*Dismissed*).

2628-85-U: United Food & Commercial Workers International Union C.L.C., A.F.L.-C.I.O., (Complainant) v. Designer Classic Carpet Manufacturing Limited, (Respondent). (*Withdrawn*).

2818-85-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Torrance I.G.A., (Respondent). (*Withdrawn*).

2847-85-U: International Woodworkers of America, (Complainant) v. Jayden Inc., (Respondent). (*Withdrawn*).

2892-85-U: Florencia Mangahas, (Complainant) v. Amalgamated Clothing and Textile Workers Union, (Respondent). (*Withdrawn*).

2899-85-U: Local 46, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Highland Equipment Limited, (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

2954-85-U: United Food & Commercial Workers Union, C.L.C., A.F.L.-C.I.O., (Complainant) v. Designer Classics Carpet Manufacturing Limited, (Respondent). (*Withdrawn*).

2977-85-U: United Steelworkers of America, (Complainant) v. Johnson-Matthey Limited, (Respondent). (*Withdrawn*).

2981-85-U: United Food & Commercial Workers Union, C.L.C., A.F.L.-C.I.O., (Complainant) v. Designer Classics Carpet Manufacturing Limited, (Respondent). (*Withdrawn*).

2987-85-U: Cara Operations Limited, (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union A.F.L.-C.I.O.-C.L.C.-O.F.L. and Bill Lal and Celester Bolt, (Respondents). (*Withdrawn*).

3033-85-U: Ross Bufalino, (Complainant) v. Retail Wholesale Department Store Union Local 461, (Respondent) v. Robinson Cone Limited, (Intervener). (*Withdrawn*).

3052-85-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Woolco Limited, (Respondent). (*Withdrawn*).

3054-85-U: United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

3085-85-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Complainant) v. Sheridan Inn (529486 Ontario Limited), (Respondent). (*Withdrawn*).

3086-85-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Oshawa Group Ltd., (Respondent). (*Withdrawn*).

3088-85-U: Peterborough Typographical Union, Local 248, (Complainant) v. Northumberland Publishers

Limited, the Cobourg Daily Star, the Port Hope Evening Guide, the Campbellford Herald, the Newcastle Reporter, and the Colborne Chronicle, (Respondents). (*Withdrawn*).

3092-85-U: Toronto Typographical Union Local 91, (Complainant) v. Fitzhenry-Whiteside Ltd., (Respondent). (*Withdrawn*).

3095-85-U: The United Brotherhood of Carpenters and Joiners of America, Local 2679, (Complainant) v. B & E Furniture Manufacturing Company Limited, (Respondent). (*Withdrawn*).

3143-85-U: Hubert Newsome, (Complainant) v. 1) (UAW) United Auto Workers, 2) Milrod Metal Products, (Respondents). (*Withdrawn*).

3154-85-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Torrance I.G.A., (Respondent). (*Withdrawn*).

3160-85-U: Keith Ashley, (Complainant) v. Consumers' Distributing Centre, (Respondent) v. Teamsters, Local Union 419, (Intervener). (*Withdrawn*).

3169-85-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Latem Industries Limited, (Respondent). (*Withdrawn*).

3170-85-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Latem Industries Limited, (Respondent). (*Withdrawn*).

3190-85-U: Labourers' International Union of North America, Local 527, (Complainant) v. Anthes Equipment Ltd., (Respondent). (*Withdrawn*).

3205-85-U: United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

0001-86-U: Toronto Typographical Union, Local 91, (Complainant) v. Fitzhenry-Whiteside Ltd., (Respondent). (*Withdrawn*).

0063-86-U: Anita Rose Reece, (Complainant) v. United Steel Worker's Union, (Respondent). (*Withdrawn*).

0082-86-U: Canadian Union of Public Employees - Local #19, (Complainant) v. Peterborough Civic Hospital, (Respondent). (*Withdrawn*).

0083-86-U: Amalgamated Clothing & Textile Workers Union, (Applicant) v. Harding Carpets Limited, (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

0088-86-U: Marc Lefebvre, Jocelyn Lefebvre, (Complainants) v. Encon Insulation Ltd. Owners: Jacques Pasquin, R. Savage, (Respondents). (*Withdrawn*).

0097-86-U: Canadian Union of Public Employees, (Complainant) v. Malwell Villa, (Respondent). (*Withdrawn*).

0098-86-U: United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

0099-86-U: United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

0100-86-U: United Food & Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent). (*Withdrawn*).

- 0108-86-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Complainant) v. Latem Industries Limited, (Respondent). (*Withdrawn*).
- 0151-86-U:** F. Yhap, (Complainant) v. (1) Fred Lougheed & Jim Eden & (2) Gord Allan of C.U.P.E. Local 1540 of C.U.P.E., (Respondents). (*Withdrawn*).
- 0163-86-U:** Ron Menard, (Complainant) v. Canadian Union of Public Employees Local 1162, (Respondent). (*Withdrawn*).
- 0175-86-U:** Canadian Union of Public Employees, (Complainant) v. Walwell Villa, (Respondent). (*Withdrawn*).
- 0198-86-U:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Complainant) v. 141527 Canada Inc., carrying on business as Geracon Drywall, (Respondent). (*Granted*).
- 0200-86-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Diamond Baling Company Ltd./ R.E. Dumouchelle & Sons Limited and Pat Dumouchelle, (Respondent). (*Withdrawn*).
- 0203-86-U:** Babu Ramji, (Complainant) v. The Hotel Employees Restaurant Employees Union Local 75 of the Hotel Employees' Restaurant Employees' International Union (The Union), (Respondent). (*Withdrawn*).
- 0208-86-U:** United Steelworkers of America, (Complainant) v. Capital Disposal Equipment Inc., (Respondent). (*Withdrawn*).
- 0215-86-U:** Ontario Nurses' Association, (Complainant) v. Lincoln Place Nursing Home, (Respondent). (*Withdrawn*).
- 0225-86-U:** United Food and Commercial Workers International Union AFL, CIO, CLC, Local 617P, (Complainant) v. Delft Blue Farms, Grodell Foods, Grober Farms, (Respondent). (*Withdrawn*).
- 0234-86-U:** United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. ABC Electro Powder Coating Limited, (Respondent). (*Withdrawn*).
- 0240-86-U:** London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Complainant) v. Caressant Care Rest Home, (Respondent). (*Withdrawn*).
- 0241-86-U:** London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Complainant) v. Aylmer Nursing Home, (Respondent). (*Withdrawn*).
- 0261-86-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. Wall-Art Productions Limited, (Respondent). (*Withdrawn*).
- 0298-86-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Joy Displays Inc., (Respondent). (*Withdrawn*).
- 0324-86-U:** Labourers' International Union of North America, Local 183, (Complainant) v. 470187 Ontario Limited known as "Kennedy Apartments", (Respondent). (*Withdrawn*).
- 0363-86-U:** Toronto Typographical Union, Local 91, (Complainant) v. Fitzhenry-Whiteside Ltd., (Respondent). (*Withdrawn*).

FINANCIAL STATEMENT

2618-85-M: Wayne Jolicoeur and Ken DelVecchio, (Complainants) v. Local 2251 United Steelworkers of America, (Respondent). (*Dismissed*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1098-85-M: The Barrie Public Library Board, (Applicant) v. Canadian Union of Public Employees and its Local 2380 (Library Staff), (Respondent). (*Dismissed*).

1154-85-M: London and District Service Workers' Union, Local 220, (Applicant) v. Kitchener Waterloo Hospital, (Respondent). (*Dismissed*).

3028-85-M: Office & Professional Employees International Union, Local 342, (Applicant) v. United Way of Greater Toronto, (Respondent). (*Granted*).

3134-85-M: Corporation of the City of Barrie, (Applicant) v. The Canadian Union of Public Employees, Local 2380, (Respondent). (*Dismissed*).

3180-85-M: Ontario Public Service Employees Union, (Applicant) v. Mississauga Ambulance Service, (Respondent). (*Dismissed*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0019-86-OH: John H. McLean, (Complainant) v. Cardinal Couriers Ltd., Owner: Richard Cooper, Director of Operations: Steve Ireland, (Respondents). (*Withdrawn*).

0202-86-OH: Goldburn Bruce, (Complainant) v. Wellesley Hospital (Gary Compeau) Maintenance Manager, (Respondent). (*Withdrawn*).

0426-86-OH: Ronald Mrochek, (Complainant) v. Dave Boyd (Supervisor) Falconbridge Ltd., (Respondent). (*Withdrawn*).

3112-85-OH: Colin Brasg, P. Eng., (Complainant) v. T.H. Best Printing Co. Ltd., (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

1717-85-M: Ontario Public Service Employees Union, (Applicant) v. Canadore College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

2445-83-M: Ontario Sheet Metal Workers Conference, (Applicant) v. Ontario Hydro, (Respondent). (*Dismissed*).

0757-84-M: International Association of Heat and Frost Insulators & Asbestos Workers and the International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, (Applicant) v. Inscan Contractors (Ontario) Inc., (Respondent). (*Granted*).

3483-84-M: Ontario Sheet Metal Workers Conference, Sheet Metal Workers' International Association, Local 269, (Applicants) v. E. S. Fox Ltd., Ontario Sheet Metal and Airhandling Group, (Respondents). (*Dismissed*).

1040-85-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. MBD Drywall Systems Ltd., (Respondent). (*Granted*).

1555-85-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Inscan Contractors (Ontario) Inc. and Advanced Insulation Covers A.I.C. Inc., (Respondents). (*Withdrawn*).

2102-85-M: International Brotherhood of Painters and Allied Trades, Local 200, (Applicant) v. 140341 Canada Limited and Killarney Glass & Aluminum Ltd., (Respondent). (*Withdrawn*).

2244-85-M: Labourers International Union of North America, Local 527, (Applicant) v. Uniform Development Corporation Uniform Developments & Leasing Limited Uni-Form Builders Limited, (Respondents). (*Withdrawn*).

2253-85-M: International Union of Elevator Constructors Local 50, (Applicant) v. Otis Elevator Company Limited, (Respondent). (*Withdrawn*).

2685-85-M: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. E.M. Carpenters (1982) Ltd., (Respondent). (*Granted*).

2722-85-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. A. Volpatti Plastering & Construction Limited, (Respondent). (*Granted*).

2733-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Heart Construction Co., (Respondent). (*Granted*).

2809-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Tornat Consolidated Inc., (Respondent). (*Withdrawn*).

3141-85-M: Labourers' International Union of North America Local 493, (Applicant) v. Linrin Forming Limited, (Respondent). (*Granted*).

3195-85-M: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 539, (Applicants) v. Gallaway Roofers Limited, (Respondent). (*Granted*).

0023-86-M: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Eagle Store Fixtures Ltd., (Respondent). (*Granted*).

0093-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ontario Paving Company, (Respondent). (*Withdrawn*).

0110-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. New Style Drywall Ltd., (Respondent). (*Withdrawn*).

0112-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. S & D Giamberardino, (Respondent). (*Withdrawn*).

0119-86-M: Labourers' International Union of North America, Local 1059, (Applicant) v. The John Hayman & Sons Company Limited, (Respondent). (*Withdrawn*).

0140-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Bee-Jay Installation, (Respondent). (*Granted*).

0145-86-M: United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant) v. Victoria Carpentry Limited, (Respondent). (*Withdrawn*).

0147-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Charles J. Brohman, Project Management, (Respondent). (*Granted*).

0153-86-M: Millwright District Council of Ontario, Local 1592, (Applicant) v. B & P Installation and Services Ltd., (Respondent). (*Granted*).

0168-86-M: International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Downsview Drywall Limited, (Respondent). (*Granted*).

0176-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. L. Zoratto and Son Carpentry c.o.b. as Bluestream Investments Company Incorporated, (Respondent). (*Withdrawn*).

0180-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Aberdeen Highlands Construction Ltd., (Respondent). (*Withdrawn*).

0196-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Gazzola Paving Limited, (Respondent). (*Withdrawn*).

0197-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. 141527 Canada Inc., carrying on business as Geracon Drywall, (Respondent). (*Granted*).

0205-86-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Groff Plumbing and Heating, (Respondent). (*Withdrawn*).

0212-86-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. 615117 Ontario Ltd., c.o.b. as York Thermal, (Respondent). (*Granted*).

0232-86-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Copper Cliff Insulation Ltd., (Respondent). (*Withdrawn*).

0282-86-M: Christian Labour Association of Canada, (Applicant) v. Tru-Con Limited, (Respondent). (*Withdrawn*).

0283-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Toddbrook Carpentry Ltd., (Respondent). (*Withdrawn*).

0300-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Duet Interior Systems, (Respondent). (*Granted*).

0301-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Charles J. Brohman, Project Management, (Respondent). (*Withdrawn*).

0303-86-M: Local 200 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Mike Braovac Painting, (Respondent). (*Withdrawn*).

0365-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Nick Digiorgio Investments (399480 Ontario Ltd.), (Respondent). (*Withdrawn*).

0401-86-M: International Union of Bricklayers & Allied Craftsmen Local #9, (Applicant) v. L. Jan Masonry Ltd., (Respondent). (*Withdrawn*).

0408-86-M: Labourers' International Union of North America, Local 506, (Applicant) v. Yorkview Concrete Finishing Ltd., (Respondent). (*Withdrawn*).

0441-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. 573766 Ontario Limited, (Respondent). (*Withdrawn*).

0442-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. Baywood Carpentry Limited, (Respondent). (*Withdrawn*).

0454-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Parity Dry-wall & Acoustics Ltd., (Respondent). (*Withdrawn*).

0524-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. Vemar Construction Ltd., (Respondent). (*Withdrawn*).

0525-86-M: United Brotherhood of Carpenters' and Joiners of America, Local 785, (Applicant) v. Eastern Construction Company Limited, (Respondent). (*Withdrawn*).

HOSPITAL LABOUR DISPUTES ARBITRATION ACT

2521-85-U: The Association of Allied Health Professionals: Ontario, (Complainant) v. Etobicoke General Hospital, (Respondent). (*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0511-84-U: Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Malette Lumber (1969) Limited and Gerald Brousseau, (Respondents). (*Denied*).

2084-85-OH: Peter C. Buttenaar, (Complainant) v. The Municipality of Metropolitan Toronto, J. Ritchie; L. Lipp; J. Carnduff; K. F. Martelock; J. Horvath; J. Lees; P. Ferguson; F. J. Horgan, (Respondents). (*Denied*).

2775-85-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Victory Plumbing Inc., (Respondent). (*Denied*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

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